TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

OESTERLEIN MACHINE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 5, 1927
CERTIORARI GRANTED MAY 2, 1927

(32563)

Marshalls
should be claimed
1- Each year
Stands on its
own bottom
This appeal no
deficiency - 18
210 The Commr
has the right
to appeal the
assessment
Compelled
to give Sp
assessment
9.296.17

1- Taxes for 1918 were reduced by the Commissioner
1918 The there was no "deficiency" for that year. No
appeal is given unless there is difference
in favor of the Government between the return
and the assessment.

1919 Held that special assessment under S B 328
1918 was properly denied. The tax for that year
was by the Commr increased over the return by
10,240.09. i.e a "deficiency" of that amount
[The last figure includes $245 for 1920]

10240.09
4000
12240.09
182.45
5%64

The Co appealed to the B.T.A (1) It alleged
that as 1918 assessed under 328, the standard
was defective and that there should have
10240.09 been a greater reduction from the tax
9296.17 it claimed in its return (2) that the Commr
943.92 ought to have assessed as to 1919 specially
182.45 under S 328 because (a) he could not ascertain
1126.37 invested Capital for 1917. (b) Net income for 19
was abnormal (c) Profits tax was greater than

appeal is given unless there is difference in favor of the Government between the return and the assessment.

1919 Held that special assessment under S B 328 1918 was properly denied. The tax for that year was by the Commr increased over the return by 10,240.09. I.e a "deficiency" of that amount [The last figure includes $245 for 1920]

10240.09
4000
12240.09
6295
5764

The Co appealed to the B. T. A (1) It alleged that as 1918 assessed under 328, the standard was defective and that there should have been a greater reduction from the tax it claimed in its return (2) that the Commr ought to have assessed as to 1919 specially under S 328 because (a) he could not ascertain invested Capital for 1917. (b) Net income for 1919 was abnormal (c) Profit tax was greater than the ratio average of upon corporations alleged to be average -

10240.09
4296.17
943.92
182.45
1126.37

The Commr denied jurisdiction of B. T. A. to authorize deposition or require response to subpoena because (1) S 327, 328 gave him non-reviewable power to determine whether

whether relief should be granted by St
assessment + that such assessments
were final (2) The information submitted
by other tax payers had been received in confi-
dence and its disclosure was prohibited
by law. - The B T A. Sup Ct -
+ C of A all held against the
Commissioner -

"

Now [is for the first time] the Commr
Contends I that the B.T.A had no jurisdiction
under the Act of 1924 to review the tax for 1918
as there was no deficiency - i.e appeal
lies only when return is less than the
assessment - That each year must
be separately considered — II That
the Commissioner's decision that the
Company was not entitled to a
Special assessment [is respect of the invested
Capital feature] is final. —

1 Each year stands on its own
bottom:

2. It may be is for the Commr finally
to decide when Special assessment
shall be Made - But leaving that
to the B.T.A would not require mandamus -

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 210

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vs.

OESTERLEIN MACHINE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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1 [Caption omitted.]

In Supreme Court of District of Columbia

Equity No. 44155

OESTERLEIN MACHINE COMPANY (A CORPORATION), PETITIONER

vs.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, AND UNITED States Board of Tax Appeals, defendants

Petition

Filed May 25, 1925

To the Honorable the Judges of the Supreme Court of the District of Columbia:

The petitioner respectfully states:

1. That the petitioner, the Oesterlein Machine Company, is a corporation incorporated under the laws of the State of Ohio, with its principal office at 3301 Colerain Avenue, Cincinnati, Ohio, and brings this petition in its own right.

2. That the defendant, David H. Blair, is a citizen of the United States, a resident of the District of Columbia and Commissioner of Internal Revenue, and is sued both in his own right and as Commissioner of Internal Revenue.

3. The defendant, United States Board of Tax Appeals, is a quasi-judicial tribunal established under the revenue act of 1924 (Pub. No. 176, 68th Cong.) and has offices in the Investment Building, 15th and K Streets, Northwest, Washington, D. C., and is made a defendant as hereinafter shown. J. Gilmer Korner, Jr., is chairman of said board, and Robert C. Tracy its secretary.

4. In 1918 the petitioner duly filed its income and excess-profits tax returns for the year 1917 under the provisions of the revenue act of 1916 (39 Stat. L. 756, chap. 10) as amended by the revenue act of 1917 (40 Stat. L. 300, chap. 12) and under the revenue act of 1917 (40 Stat. L. 300, chap. 12).

5. In 1919 and 1920, respectively, the petitioner duly filed its income and profits tax returns for the years 1918 and 1919 under the

2 provisions of the revenue act of 1918 (40 Stat. L. 1062, chap. 18), showing thereon taxes due as follows, to wit, $54,351.29 for the year 1918, and $20,453.66 for the year 1919, which said taxes were duly paid. The net income for each year reported by the petitioner in said returns was overstated by reason of petitioner's failure to claim and take certain deductions allowed by law, a part of which said deductions were later allowed the petitioner by the Commissioner of Internal Revenue.

6. The excess-profits tax imposed by Title II of the revenue act of 1917 is computed by reference to the relation between net income and invested capital determined as therein provided. Section 210 of said Title II provides in effect that in case the Secretary of the Treasury is unable satisfactorily to determine the invested capital of a corporation the excess-profits tax in such case shall be computed by reference to the average ratio of net income to invested capital of a group of representative corporations engaged in a like or similar trade or business.

7. The war-profits and excess-profits tax imposed by Title III of the revenue act of 1918 is likewise computed by reference to the relation between net income and invested capital determined as therein provided; and sections 327 and 328 of said Title III provide that where the Commissioner of Internal Revenue is unable satisfactorily to determine the invested capital of a corporation, in such case the tax shall be the same percentage of net income as the average percentage of tax to net income of a group of representative corporations engaged in a like or similar trade or business and similarly circumstanced with respect to certain factors therein specified.

8. On April 17, 1920, the then Deputy Commissioner of Internal Revenue, G. V. Newton, addressed to the petitioner a letter in regard to petitioner's 1917 returns, stating:

"That owing to defective accounting, your statutory capital cannot be satisfactorily determined. Your case has been given consideration under the provisions of section 210 of the revenue act of October 3, 1917, and articles 18, 24, and 52 of Regulations 41, which provide that an excess-profits tax may be based upon a comparison with a group of concerns engaged in a like or similar line of business, which in their general character are comparable, as to the essential component parts influencing the tax liability to your company."

9. After receiving the deputy commissioner's letter of April 17, 1920, referred to in paragraph 8 above, your petitioner, believing that the Commissioner of Internal Revenue would experience the same inability to determine petitioner's invested capital for the years 1918 and 1919 that the commissioner had experienced in determining invested capital for 1917, filed in 1921 amended returns for the years 1918 and 1919, showing thereon the same amount of taxable net income as previously shown on the original returns, but showing no invested capital on such amended returns, and no computation of tax. Attached to each of the amended returns for 1918 and 1919 was a rider reading as follows:

"This amended return is filed in accordance with T. D. 3220 of August 26, 1921, and in that connection your attention is called to attached copy of our letter of October 5, 1918, and abstract of your letter from April 17, 1920, IT–C–SM–WFF–20751, 648.

3 "As the tax for 1917 has been assessed by the department and paid under the provisions of section 210 of the revenue act of 1917, similar relief for 1918 and subsequent years is requested under sections 327 and 328 of the act of 1918, and all details as to

invested capital and resulting tax have been accordingly omitted on our amended returns now filed in compliance with T. D. 3220."

10. Thereafter, one C. F. Mayer, a United States internal revenue agent, in performance of his official duty, made a field examination of petitioner's books and records for the purpose of checking petitioner's liability for 1918, 1919, and 1920 taxes, and made an official report under date of February 15, 1923, addressed to Internal Revenue Agent in Charge, Cincinnati, Ohio, reading in part as follows:

"The statutory invested capital can not be satisfactorily determined for reasons as detailed in this report under heading 'Comments in reference to claim for refund, year 1917.'

"In determining the tax liability for the year 1917, owing to defective accounting, taxpayer has been given consideration under the provisions of section 210 of the revenue act of October 3, 1917, and reference is made to A–2 letter April 17, 1920.

"The defective accounting was remedied in years subsequent to 1917, however, adjustments made by Ernst and Ernst, as at December 31, 1917, are reflected in financial statements of succeeding years.

"The assumption is that the same status as to statutory capital as in prior years is in evidence for the years 1918 to 1920 now under review, and the taxpayer requests consideration under sections 327 and 328 of the revenue act of 1918 and has already made application to the department to this effect.

"In conclusion, as a precedent has been established by the department for the year 1917 in the application of section 210, revenue act of 1917, the assumption is the taxpayer will receive consideration under sections 327 and 328 of the revenue act of 1918 for the years 1918 to 1920 under review.

"As invested capital is not satisfactorily determinable, and in view of the taxpayer's request submitted to the department, this report does not embody computations to establish the tax liability with invested capital as a factor."

11. On April 12, 1923, the office of the Commissioner of Internal Revenue addressed to petitioner a letter setting forth a revised computation of tax liability for the years 1918, 1919, and 1920, showing total taxes as follows:

Year 1918	$68,335.92
" 1919	26,998.84
" 1920	371.66

12. The aforesaid revised computation of tax for 1918 and 1919 was made in part under section 301 of the revenue act of 1918 by using an invested capital assumed to have been determined under section 326 of the act, and without reference to sections 327 and 328 of the act, and without reference to petitioner's amended returns and the petitioner's application for assessment under sections 327 and 328. The profits tax, exclusive of normal tax, for 1918, computed as aforesaid, amounted to $43.85 per cent of the net income.

4 13. On April 13, 1923, petitioner filed an appeal with the Commissioner of Internal Revenue protesting against certain income adjustments for the years 1918, 1919, and 1920.

14. On May 5, 1923, petitioner addressed a letter to the Commissioner of Internal Revenue, again requesting that its tax liability be determined under sections 327 and 328 of the revenue act of 1918.

15. On August 6, 1923, the office of the Commissioner of Internal Revenue, after making certain reductions in the net income for each year shown in aforesaid (paragraph 11 above) letter of April 12, 1923, issued a revised tax letter setting forth a revised computation of petitioner's tax for 1918, 1919, and 1920, showing total taxes as follows:

Year 1918	$51,722.11
" 1919	30,693.75
" 1920	102.45

16. In the aforesaid letter of August 6, 1923, the profits tax, exclusive of normal tax, for 1918 was determined under section 328 of the revenue act of 1918 to be 52.79 per cent of net income; the profits tax for 1919 was computed under section 301 of the act, upon the basis of invested capital assumed to have been determined under section 326, and without reference to sections 327 and 328.

17. On March 13, 1924, petitioner filed a protest with the Commissioner of Internal Revenue against the determination of tax set forth in the aforesaid letter of August 6, 1923, which said protest was referred by the commissioner to his appellate agency, known as the Committee on Appeals and Review, now abolished.

18. After hearing, the said committee rendered a decision, recommendation No. 7402, April 1, 1924, which was approved by David H. Blair, Commissioner of Internal Revenue, in which recommendation the committee said, in part:

"* * * The net income for each year is abnormal in other respects, details of which are of no particular importance in this record. The committee, after careful consideration, is of the opinion that the profits tax for the year 1918 in the amount of 44.23 per cent of corrected net income is equitable to the Government and the taxpayer.

"With respect to the year 1919 the committee has investigated the statistics of concerns which were suggested at the oral hearing and the statistics of additional concerns, and is of the opinion that assessment of the profits tax for the year 1919, under the provisions of section 328 of the 1918 revenue act was properly denied."

19. Thereafter the office of the Commissioner of Internal Revenue issued a tax letter dated June 28, 1924, copy of which is attached hereto as Exhibit A which was mailed to petitioner on June 28, 1924, by registered mail, setting forth a tax for 1918 of $45,055.12, and stating: "The tax liability for 1919 and 1920 as shown in office letter of August 6, 1923, is hereby affirmed."

20. The profits tax, exclusive of normal tax, for 1918 shown in aforesaid letter of June 28, 1924, was determined under section 328 of the revenue act of 1918 to be 44.23 per cent of net income, with the following explanation, as contained in said letter:

5 "The rate established under section 328 by the committee had been applied to the income for 1918 as shown in office letter dated August 6, 1923. * * *"

21. Within sixty days from the date of mailing aforesaid letter, to wit, on August 22, 1924, petitioner filed a petition with the defendant Board of Tax Appeals, appealing from the determination of the defendant Commissioner of Internal Revenue, as set forth in aforesaid letter of June 28, 1924, on the grounds, among others, (1) that the commisisoner erred in determining the percentage of profits tax for the year 1918 under section 328 of the revenue act of 1918, and (2) that the commisisoner erred in refusing to determine the profits tax for 1919 under said section 328. Copy of said petition is attached hereto as Exhibit B.

22. On September 12, 1924, the defendant, David H. Blair, Commissioner of Internal Revenue, by his attorney, Nelson T. Hartson, Solicitor of Internal Revenue, filed with the defendant Board of Tax Appeals an answer to the aforesaid petition. Copy of said answer is attached hereto as Exhibit C.

23. On October 2, 1924, hearing was had before the Board of Tax Appeals on the aforesaid appeal. By order of the Board of Tax Appeals the said appeal was continued and placed on the reserve calendar for the taking of proofs, and to permit petitioner to engage counsel for the further prosecution of the appeal.

24. Thereafter, on Oct. 13, 1924, counsel for petitioner filed with the defendant, the Board of Tax Appeals, application for an order to take the deposition of one John F. Barnes of Rockford, Illinois, who was expected to give certain testimony relating to the Federal income and profits taxes of W. F. and John Barnes Company, a corporation of Rockford, Illinois, for the years 1918 and 1919.

25. The defendant, Commissioner of Internal Revenue, by his attorney, Nelson T. Hartson, Solicitor of Internal Revenue, thereupon filed with the defendant, the Board of Tax Appeals, a motion to strike aforesaid application on the ground, among others, that (1) the United States Board of Tax Appeals had no jurisdiction to review the action of the Commisisoner of Internal Revenue in granting or refusing to grant special assessment under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921. Copy of the aforesaid motion is attached hereto as Exhibit D.

26. On November 1, 1924, hearing was had on the aforesaid motion of the commissioner, and on December 11, 1924, the Board of Tax Appeals rendered a decision denying the motion to strike by the Commissioner of Internal Revenue with an opinion published in the official reports of the Board of Tax Appeals, vol. 1, No. 3, at page 159, copy of which is attached hereto as Exhibit E.

27. On March 17, 1925, counsel for petitioner filed with the Board of Tax Appeals an application of a subpœna directed to the defendant, David H. Blair, Commissioner of Internal Revenue, requiring him to answer in writing under oath certain questions of fact, relating

to the taxes of certain other taxpayers who were engaged in a trade or business like or similar to that of petitioner in the years 1918 and 1919. Copy of said application is attached hereto as Exhibit F.

6 28. After hearing on the aforesaid application, the Board of Tax Appeals issued said subpœna as prayed for directed to the defendant, David H. Blair, Commisisoner of Internal Revenue, under the provisions of section 900 (i) of the revenue act of 1924, requiring him to answer in writing under oath certain questions of fact specified in schedule thereto annexed relating to the 1918 and 1919 Federal war-profits and excess-profits taxes of twelve specified corporations, and of certain other corporations used as comparatives by the commissioner in his determination of petitioner's tax liability for 1918 and 1919. Copy of the subpœna is attched hereto as Exhibit G.

29. The defendant, David H. Blair, Commissioner of Internal Revenue, failed and refused to obey aforesaid subpœna, but addressed a communication to the Board of Tax Appeals under date of March 28, 1925, stating his opinion that the duties of his office would not admit the furnishing of the information called for in said subpœna, and stating as his reasons (1) that the information called for in interrogatories annexed to said subpœna was communicated to him as Commissioner of Internal Revenue in strict confidence and is privileged, and (2) that answer to said interrogatories will divulge information and data from the records in his office, publication of which is prohibited by the provisions of section 3167 of the Revised Statutes, all of which will more fully appear from a copy of said communication attached hereto as Exhibit H.

29½. The aforesaid failure and refusal of the defendant, David H. Blair, Commissioner of Internal Revenue, is arbitrary, wrongful, and illegal, and the reasons advanced by him as aforesaid for such failure and refusal are insufficient and invalid, and such failure and refusal is inconsistent with the act of said defendant in introducing in evidence and making public in appeals pending before the United States Board of Tax Appeals the income-tax returns of third persons not parties to such appeals, which he, the said defendant, Commissioner Blair, by his attorney, did on February 17, 1925, at Huntington, West Virginia, on February 18, 1925, at Bluefield, West Virginia, on February 19, 1925, at Roanoke, Virginia, and on February 20, 1925, at Lynchburg, Virginia, introducing in evidence, in the appeal of the Citizens Underwriters Agency then being heard before a member of said board, the income-tax returns of several, to wit: Eleven other persons not parties to said appeal, as will appear on pages 21, 22, 115, 116, 243, 244, 260, 270, 271, 287, 288, 308, 309, 332, 333, 361, 362, 562, 563, and 573, stenographer's minutes of the proceedings in Appeal of Citizens Underwriters Agency, United States Board of Tax Appeals Docket No. 100; and again on March 2, 1925, introducing in evidence in the appeal of Denholm & McKay Company then being heard before said board in Washington, D. C., the

income-tax returns of another taxpayer not a party to the appeal, as will appear on page 74, stenographer's minutes of the proceedings in appeal of Denholm & McKay Company, United States Board of Tax Appeals Docket No. 643.

30. Petitioner is advised that it was and is the duty of the defendant, the Board of Tax Appeals, and under the law it was encumbent upon said board to enable it to fully perform the function for
7 which it was created, to procure the information sought by aforesaid subpœna of the board from the defendant, Commissioner Blair. Accordingly, on April 13, 1925, the petitioner filed with the Board of Tax Appeals a motion entitled "Motion to proceed in court," moving the Board of Tax Appeals to apply to the Supreme Court of the District of Columbia under provisions of section 1025 (a), revenue act, 1924, for appropriate process to compel the defendant, Commissioner Blair, to obey the subpœna of the board and to make answer in writing under oath to the aforesaid question of fact. Copy of the motion to proceed in court is attached hereto as Exhibit I.

31. On April 27, 1925, the Board of Tax Appeals issued an order denying petitioner's motion to proceed in court, stating that such action by the board was unnecessary because, in their opinion, the purpose of section 1025 (a) was to afford relief primarily to the party at whose instance the subpœna is issued and that such party would be the logical party plaintiff to apply to the court for appropriate process to secure its rights under the law, all of which will more fully appear from a copy of the opinion and order of said board attached hereto as Exhibit J.

32. The tax determined by the defendant commissioner for the year 1918 as set forth in the aforesaid letters (paragraphs 15 and 19 above) of August 6, 1923, and June 28, 1924, was computed in part on the basis of facts which have not been disclosed to the Board of Tax Appeals or to the petitioner, but the defendant commissioner, his agencies and representatives, have hitherto kept secret and undisclosed and have refused, and still refuse, to reveal to the petitioner or to the Board of Tax Appeals the facts upon which said tax was computed. The defendant, Commissioner Blair, his agencies and representatives, have likewise kept secret and refused to reveal either to petitioner or said board the facts upon which said commissioner determined that petitioner's tax for the year 1919 should not be computed under section 328, revenue act of 1918.

33. Petitioner was, in the years 1918 and 1919, engaged in the business of manufacturing and selling machine tools.

34. Petitioner, after inquiry by letter and in person through its president, Charles D. Oesterlein, is informed, and, so believing, avers that said corporations were engaged in a trade or business like or similar to that of petitioner, that said corporations filed Federal income and profits tax returns for the years 1918 and 1919, and were representative taxpayers in those years, and that the said corpora-

tions are comparable as nearly as may be required by section 328 of the revenue act of 1918.

35. All the facts sought to be proved by means of answers required by the aforesaid subpœna are within the official knowledge of the defendant Commissioner Blair and are not within the knowledge of any other person whomsoever outside the commissioner's office, and the data required by said subpœna are in the records and files of said commissioner's office.

36. The answers required by aforesaid subpœna are relevant, material, and necessary to enable the defendant, the Board of Tax Appeals, to hear and determine petitioner's appeal now pending before the board.

37. The evidence sought to be adduced by aforesaid subpœna of the Board of Tax Appeals and schedule thereto annexed is the
8 primary and best evidence on the subject of this petitioner's liability for tax computed under provisions of section 328, revenue act of 1918.

38. The defendant, the United States Board of Tax Appeals, having been requested by petitioner as aforesaid, to apply to the Supreme Court of the District of Columbia, under the provisions of section 1025 (a) of the revenue act of 1924, for appropriate process to compel obedience of said Commissioner Blair, to its subpœna, and having declined so to do for the reasons hereinbefore set forth, for that reason is made a defendant herein.

Wherefore, being without remedy except by assistance of this court, your petitioner prays:

I

That said David H. Blair, Commissioner of Internal Revenue, and the United States Board of Tax Appeals be made defendants hereto, and that the writ of subpœna may issue to them commanding them and each of them to appear and make answer to the exigencies of this petition;

II

That a rule issue out of this court to be served upon the defendants and each of them and requiring them to show cause, if any they have, herein on a day named why the prayers of this petition for relief should not be granted, and why the defendant Commissioner of Internal Revenue should not be required to forthwith obey the subpœna issued by the defendant United States Board of Tax Appeals, and to answer under oath the questions submitted by said board along with said subpœna calling for information necessary and proper to enable said board to pass upon and determine the rights of this petitioner in the premises;

III

And that a decree be passed in this cause requiring the defendant Commissioner Blair to produce before the United States Board of

Tax Appeals the data in manner and form as specified and required by the aforesaid subpœna of the board and schedule thereto annexed which he has hitherto declined to do as aforesaid, and to produce before said board any and all other relevant and necessary data relating to the aforesaid appeal now pending before the Board of Tax Appeals which said board may require him to produce;

IV

And for such other and further relief as the nature of the case may require and to the court may seem equitable and proper.

OESTERLEIN MACHINE COMPANY, INC.,
By EDWARD MCCARTHY, JR., *Attorney.*

HAMILTON & HAMILTON,
MILLER & CHEVALIER,
Attorneys for Petitioner.

9 [*Duly sworn to by Edward McCarthy, jr. Jurat omitted in printing.*]

Exhibit A to petition

Officer of Commissioner of Internal Revenue

TREASURY DEPARTMENT,
Washington, June 28, 1924.

OESTERLEIN MACHINE COMPANY,
3301 Colerain Avenue, Cincinnati, Ohio.

SIRS: Reference is made to your income and profits-tax returns for 1918, 1919, and 1920 and to the committee on appeals and review recommendation #7402 under date of April 1, 1924.

After a careful checking of the items involved for these three years it has been disclosed that the amount of cost on which amortization was allowed for 1917 was $23,922.45, which was increased by $78,620.65, making a total cost of $102,543.10 to be amortized for 1918. This item, $78,620.65, is made up as follows:

Buildings	$20,201.02
Machinery	27,647.02
Power-plant machinery	852.63
Factory equipment	24,845.87
Office equipment	5,074.21
Total	$78,620.75

It will be noted that the amount, $24,845.87, has been taken as cost upon which amortization was allowed. This item therefore was properly excluded from the cost upon which depreciation was computed for 1918, since under the regulations a deduction for amortization and depreciation can not be allowed upon the same asset, but that any allowance for the former is inclusive of the latter.

Examination of the 1919 and 1920 returns discloses the same condition for those years.

These items of additional depreciation claimed therefore are based upon a cost which was used as a basis for amortization, and since the amortization was allowed the depreciation can not be, and the income for these three years, as shown in office letter dated August 6, 1923, is correct and is hereby sustained.

10 The item of $7,707.34 questioned in paragraph 2, page 2, of your brief of April 30, 1923, is arrived at as follows:

Total depreciation originally allowed for 1918	$24,536.21
10% on factory equipment erroneously omitted	1,258.63
Total	$25,794.84
Total (brought forward)	$25,794.84
Plus 25% additional per committee recommendation #3154	6,448.71
Total	$32,243.55
25% additional allowed	$6,488.71
10% previously omitted	1,258.63
Total as above mentioned	$7,707.34

The rate established under section 328 by the committee has been applied to the income for 1918, as shown in office letter dated August 6, 1923, with the following result:

Net income			$88,896.99
Profits tax			39,349.41
Net income		$88,896.99	
Less:			
Profits tax	$39,349.41		
Exemption	2,000.00		
		41,349.41	
Balance taxable at 12%		47,547.58	5,705.71
Total tax assessable			$45,055.12
Tax previously assessed			$54,351.29
Tax assessable			45,055.12
Overassessment indicated			$9,296.17

The tax liability for 1919 and 1920, as shown in office letter of August 6, 1923, is hereby affirmed.

In accordance with the provisions of section 274 of the revenue act of 1924 you are allowed sixty days from the date of this letter in which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

When a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the sixty days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement is respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of

IT:E:SM–RLC–A–5870. In the event that you acquiesce in part of the determination, the agreement should be executed with respect to the items agreed to.

The right of appeal to the Board of Tax Appeals as indicated above refers only to any deficiency in tax as indicated herein, inasmuch as there is no provision in the revenue act of 1924 granting the right of appeal against the determination of any overassessment found upon an audit of your returns.

Respectfully,

(Signed) J. G. BRIGHT,
Deputy Commissioner.

Enclosure: Agreement.

United States Board of Tax Appeals

Appeal of the Oesterlein Machine Company, Cincinnati, Ohio

PETITION

Subject: Income and profits tax 1918, 1919, 1920.
Reference: IT–SA–SM, DAH–A–5870,
B–1389, C–641.
Submitted August 19, 1924.

Exhibit B to petition

The Oesterlein Machine Co.

Sheet 1.

CINCINNATI, OHIO, *August 19, 1924.*

United States Board of Tax Appeals

Appeal of The Oesterlein Machine Company, Cincinnati, Ohio

PETITION

Subject: Income and profits tax, 1918–1919–1920.
Reference: IT–SA–SM, DAH–A–5870,
B–1389, C–641.

GENTLEMEN: Referring to the letter of Commissioner of Internal Revenue dated June 28, 1924, and to the Committee on Appeals and Review Recommendation #7402 under date of April 1, 1924, in accordance with the provisions of section 274 of the revenue act of 1924, we herewith file an appeal contesting the correctness of the determinations set forth for the following reasons:

1. There is a mathematical error in the computation of profits tax due for 1918.

The committee's recommendation, page 3, first paragraph, last sentence, reads:

"The committee after a very careful consideration, is of the opinion that a profits tax for the year 1918 in the amount of 44.23 per cent of corrected net income is equitable to both the Government and the taxpayer."

Applying this rate to the net income, quoted as $88,896.99, the profits tax would be $39,319.14, and not $31,349.41.

2. An impossible conclusion is cited as a reason for disallowing certain depreciation for 1919 and 1920.

The commis'ioner's letter, in the last paragraph of the first page, referring to the years 1918, 1919, and 1920, reads:

"These items of additional depreciation claimed therefore
12 are based upon a cost which was used as a basis for amortization, and since the amortization was allowed the depreciation cannot be, etc., etc."

No amortization was allowable by the Government on purchases made in either 1919 or 1920, and therefore this decision is in error. The additional depreciation claimed for these years should be allowed in accordance with the committee's recommendation.

3. The determination is not in accordance with the committee's recommendation.

The recommendation, page 2, last paragraph, reads:

"The committee recommends accordingly that total depreciation for the years 1918, 1919, and 1920 be allowed in the following respective amounts, $33,796.42, $36,633.62, and $46,815.42, all computations subject to any check which the unit in its discretion may wish to make."

On the false grounds referred to in No. 2 above, the unit has wrongfully disallowed the additional depreciation which the committee in their recommendation concedes.

4. The committee's recommendation does not give us the relief by special assessment to which we are entitled according to the computation of the income tax unit.

Referring to page 3, the first paragraph read as follows:

"With reference to the application of the taxpayer for the determination and assessment of the profits taxes for the years 1918 and 1919, under the provisions of section 328 of the 1918 revenue act, the unit has concluded that this is an exceptional case within the scope of said section of the 1918 act. In this connection, while the committee finds that the legal effect of certain arrangements which the taxpayer entered into for the acquisition of the Tatum property was not that of a purchase, evidence has been introduced by the taxpayer to show that it was the intention to purchase such property. The unit at one time in the course of the audit computed what would have been an allowable amortization deduction had the taxpayer been the legal owner of the property, and made a finding as to amortization in the sum of approximately $46,000.00 The net income for each

year is abnormal in other respects, details of which are of no particular importance in this record. The committee, after very careful consideration, is of the opinion that a profits tax for the year 1918 in the amount of 44.23 per cent of the corrected net income is equitable to both the Government and the taxpayer."

In the statement accompanying the commissioner's letter of August 6, 1923, our profits-tax assessment for 1918 is 52.79 per cent of corrected net income, or $46,925.53. By reducing this profits tax to 44.23 per cent the amount of tax becomes $39,319.14, thus affording actual relief of only $7,606.39.

According to the computation of the Income Tax Unit to which the committee refers (report on reexamination of amortization claim of the Oesterlein Machine Company, Cincinnati, Ohio, under date of December 14, 1922) the allowable amortization deduction of $46,200.00 based upon a profits tax of 52.79 per cent would have afforded relief of $24,393.60.

The committee, in the paragraph under discussion, admits that we are entitled to relief, and we claim, this being true, that the
13 amount computed by the unit, namely, 52.79 per cent of $46,200.00 or $24,393.60, is correct and should be allowed. We are not now operating and have never since this computation was made operated as much as 25 per cent of capacity, upon which this allowance was based.

In this regard we command your attention to the summary of profits and loss for the years 1917 to and including 1923, appearing in our appeal dated March 13, 1924, reflecting a net loss for the entire period of $23,554.33. These figures also show conclusively that all actual profit earned was paid to the Government in taxes and that the book profit standing to the credit of surplus account upon which taxes was paid has since vanished. This in itself argues that the amount of tax reduction resulting from the unit's computation is not excessive.

5. The committee is in error in denying assessment of the profits tax for the year 1919 under the provisions of section 328 of the 1918 revenue act.

Concerns suggested at the oral hearing to which reference is made in the committee's recommendation, page 3, second paragraph, are as follows:

The American Tool Works Co	Cincinnati, Ohio
Bullard Machine Tool Company	Bridgeport, Conn.
Fellows Gear Shaper Company	Springfield, Vt.
Giddings & Lewis Machine Tool Co	Fond du Lac, Wis.
Gardiner Machine Co	Beloit, Wisconsin.
Hofer Manufacturing Co	Freeport, Illinois.
Kempsmith Manufacturing Co	Milwaukee, Wis.
Landis Tool Company	Waynesboro, Pa.
Taylor & Fenn Company	Hartford, Conn.

The average ratio of profits tax to income of this group of corporations, including our own, is 15.8%, where as ours alone is 20.7%.

The justification for our request for assessment of the profits tax for the year 1919 under the provisions of section 328 of the 1918 revenue act will be found in the department's letter to us under date of April 17, 1920, from which we quote:

"You are advised that owing to defective accounting, your statutory capital can not be satisfactorily determined. Your case has been given consideration under the provisions of section 210 of the revenue act of October 3, 1917, and articles 18, 24, and 52 of Regulations 41."

Under section 328 of the 1918 revenue act our profits tax for 1919 should not exceed 15.8% of corrected net income for 1919.

6. There is an error of omission in the committee's recommendation to the unit.

In our appeal of March 13, 1924, page 2, last paragraph, we say:

"The committee on Appeals and Review in disposing of our appeal of April 23, 1923, by their letter of May 21, 1923, addressed to Mr. W. B. Dickerson, page 2, last paragraph says":

"'After careful consideration the committee has reached the conclusion that neither method proposed by the unit is proper. The down payment of $10,000.00 should be regarded as advance rental, and where a taxpayer's books are kept on the accrual basis of accounting he may, at his option spread such advance rental over the term of the lease and report an aliquot part thereof each
14 year as earned. So much, therefore, of the amount received as advanced rental as was properly earned in the year 1918 should be returned as income for that year, and in view of the termination of the lease in 1919, the balance should be returned as income for the year 1919. Under this theory the sale in 1919 should be treated as an installment sale and the profit arising therefrom should be allocated rotably to 1919 and subsequent years on an installment sales basis.'

"The Income Tax Unit has not treated the sale referred to nor the profit arising therefrom in accordance with this decision."

This refers to an error in the statement accompanying the commissioner's letter of August 6, 1923. In our letter of March 3, 1923, addressed to the commissioner, in which we reported full details of the transaction involved, the last page, first paragraph, reads:

"The purchase price of the property was $35,000.00, upon which we paid a commission of 3%, or $1,050.00, and the first payment of $10,000.00 was made in accordance with the terms of the lease, as were also the following payments to and including 1920."

The commission is surely a proper deduction from the $10,000.00 leaving $8,950.00 as income to be distributed over the five years and not $10,000.00 as reflected in the computation to which we take exception. According to our computation, the "income from leasehold Grove Avenue property" in 1918 should be $1,240.71 instead

of $1,386.30. The "additional income from sale of property" in 1919 should be $9,415.96 instead of $10,320.37. No recommendation has been made by the committee in regards to these errors. Furthermore, no recommendation has been made regarding redetermining profits tax due for 1917.

This appeal is not filed for the purpose of delaying the payment of additional tax.

It is requested that the undersigned officer of this corporation be granted an oral hearing before the board on this appeal.

THE OESTERLEIN MACHINE COMPANY,

By ——— ———, *Vice President.*

Sworn to before me and subscribed in my presence this 19th day of August, 1924.

[Copy]

Exhibit C to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Co., Cincinnati, Ohio. Docket No. 46

ANSWER

The Commissioner of Internal Revenue by his attorney, Nelson T. Hartson, solicitor of internal revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

(1) Admits that the taxpayer is a corporation, and has its place of the business at Cincinnati, Ohio.

15 (2) Admits that deficiency letter dated June 28, 1924, proposing an additional assessment as computed in office letter of August 6, 1924, proposing the assessment of additional tax of $10,240.09 for the year 1919, and $182.45 for the year 1920, was mailed to the taxpayer.

(3) Denies that error was committed in computing the profits tax due from the taxpayer for the year 1918.

(4) Denies that error was committed in disallowing certain depreciations for the years 1919 and 1920 as claimed in the petition.

(5) Denies that the determination of the taxpayer's liability was not in accordance with the recommendation of the Committee on Appeals and Review.

(6) Denies that error was committed in denying to the taxpayer special assessment for the year 1919, under the provisions of section 328 of the revenue act of 1918.

(7) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

PROPOSITION OF LAW

(1) Such parts of the petition that seek a review by the Board of Tax Appeals of the overassessment for the year 1918, should be expunged.

Wherefore it is prayed that the taxpayer's appeal be denied.

NELSON T. HARTSON,
Solicitor of Internal Revenue,
Attorney for the Commissioner of Internal Revenue.

Exhibit D to petition

United States Board of Tax Appeals

In re: Oesterlein Machine Company, Cincinnati, Ohio. Docket No. 46

MOTION

Now comes the Commissioner of Internal Revenue, by his attorney Nelson T. Hartson, Solicitor of Internal Revenue, and moves to strike the application for order to take depositions filed by the taxpayer herein and for grounds of the motion says:

(1) The evidence of the witness, whose deposition it is proposed to take, is not and can not be made admissible, relevant, or competent for the purpose of proving the fact in issue, if, in fact, the board has jurisdiction to entertain an appeal and review the action of the commissioner in fixing a rate in compliance with the law in special assessment cases.

(2) The United States Board of Tax Appeals has no jurisdiction to review the action of the Commissioner of Internal Revenue in granting or refusing to grant special assessment under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921
16 and, therefore, the testimony of the witness, if taken, could serve no purpose.

(3) By section 328 of the revenue acts of 1918 and 1921 Congress has delegated to the Commissioner of Internal Revenue, subject to the restrictions and limitations contained in said section of the respective acts, authority to fix rates in making special assessments, and his action in the exercise of such authority can be reviewed or recalled only by the legislative body which gave such authority in the first instance.

(4) In granting the authority to the Commissioner of Internal Revenue to fix rates for taxing income in special assessment cases as provided in section 328 (a) (b) Congress in subjection (c) requires the commissioner to keep a record of all such cases which records Congress has retained the right to review; and this board can not draw unto itself such legislative functions, which is retained by Con-

gress to review the action of the commissioner in special assessment cases.

(5) The rule of evidence as prescribed by Congress in section 328 for determining facts upon which the rates for special assessment are to be fixed does not embrace the testimony of witnesses.

Wherefore, it is prayed that said application be denied.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Exhibit E to petition

United States Board of Tax Appeals

No. 69

Appeal of Oesterlein Machine Company. Docket No. 45

The Board of Tax Appeals has jurisdiction to hear and determine appeals from determinations of deficiencies arising under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921.

Submitted November 10, 1924; decided December 11, 1924.

Robert N. Miller, Esq., and J. R. Sherrod, Esq., for the taxpayer.

Robert A. Littleton, Esq. (Nelson T. Hartson, Solicitor of Internal Revenue), for the commissioner.

James Walton, Esq., amicus curiae.

Before HAMEL, GRAUPNER, IVINS, KORNER, MARQUETTE, SMITH, STERNHAGEN, TRAMMELL, and TRUSSELL.

This appeal came on for hearing on a motion filed by the Solicitor of Internal Revenue on behalf of the commissioner to strike the taxpayer's application for an order to take a deposition. The taxpayer's application is filed in accordance with the provisions of Rule 41 of the Rules of Practice of this board and is for an order to take the deposition of a certain designated witness whom the taxpayer proposes to examine as to facts bearing on the percentage of net income paid as profits tax by a corporation of which he is secretary and treasurer. The taxpayer proposes to offer such deposition as
17 pertinent and material evidence touching a deficiency in tax determined by the Commissioner of Internal Revenue under the provisions of sections 327 and 328 of the revenue act of 1918, and proposed by the commissioner to be assessed against the taxpayer for the years 1918, 1919, and 1920.

To the application of the taxpayer the commissioner filed the following motion:

"Now comes the Commissioner of Internal Revenue by his attorney, Nelson T. Hartson, Solicitor of Internal Revenue, and moves

to strike the application for order to take depositions filed by the taxpayer herein, and for grounds of his motion says:

"(1) The evidence of the witness whose deposition it is proposed to take is not and can not be made admissible, relevant, or competent for the purpose of proving the fact in issue, if, in fact, the board has jurisdiction to entertain an appeal and review the action of the commissioner in fixing a rate in compliance with the law in special assessment cases.

"(2) The United States Board of Tax Appeals has no jurisdiction to review the action of the Commissioner of Internal Revenue in granting or refusing to grant special assessment under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921, and, therefore, the testimony of the witness, if taken, could serve no purpose.

"(3) By section 328 of the revenue acts of 1918 and 1921 Congress has delegated to the Commissioner of Internal Revenue, subject to the restrictions and limitations contained in said section of the respective acts, authority to fix rates in making special assessments, and his action in the exercise of such authority can be reviewed or recalled only by the legislative body which give such authority in the first instance.

"(4) In granting the authority to the Commissioner of Internal Revenue to fix rates for taxing income in special assessment cases as provided in section 328 (a) (b), Congress in subsection (c) requires the commissioner to keep a record of all such cases, which records Congress has retained the right to review; and this board can not draw unto itself such legislative functions, which is retained by Congress, to review the action of the commissioner in special assessment cases.

"(5) The rule of evidence as prescribed by Congress in section 328 for determining facts upon which rates for special assessments are to be fixed does not embrace the testimony of witnesses.

"Wherefore it is prayed that said application be denied."

The motion came on for hearing on November 1, 1924, and was argued by counsel for both parties as well as by amicus curiæ.

OPINION

KORNER: The motion filed by the solicitor on behalf of the commissioner is, in effect, a plea to the jurisdiction of this board to hear and determine appeals filed by taxpayers from deficiencies in tax proposed to be assessed by the commissioner (1) in cases wherein the deficiency has been determined by the commissioner under the provisions of sections 327 and 328 of the revenue act of 1918, or under sections 327 and 328 of the revenue act of 1921, com-
18 monly referred to as "special assessment" provisions, but in which cases the taxpayer contends that the tax should be com-

puted without reference to such provisions; (2) in cases wherein the deficiency has been determined by the commissioner without reference to the special assessment provisions, but in which cases the taxpayer contends that the tax should be computed under such provisions; and (3) in cases wherein the deficiency has been determined by the commissioner under the special assessment provisions, but in which cases the taxpayer contends that such determination is in error, due to an incorrect computation of the tax under such special assessment provisions.

The motion to dismiss filed herein is based on two general propositions: (1) That a determination to assess the tax under the provisions of the special assessment sections, a refusal so to determine the tax, and the computation of the tax under those provisions when they are determined to be applicable involve an exercise of discretion vested in the commissioner by law, and that his decision and computations thereunder are not reviewable, and (2) that a review of the commissioner's computation of the tax under the special assessment sections would necessitate making public in the hearing of the appeal certain records of the commissioner in violation of the so-called " secrecy provisions " of the Revised Statutes.

The revenue act of 1924 created the Board of Tax Appeals, and whatever of jurisdiction appertains to the board is to be found in its provisions. Section 900(e) provides, in part:

"The board and its divisions shall hear and determine appeals under sections 274, 279, 308, and 312."

Section 280 of the same act provides that taxes under prior acts shall be computed under those acts, but " the amounts so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations * * * as in the case of the taxes imposed by this title * * *."

The taxes involved in this appeal are income and profits taxes for the years 1918, 1919, and 1920. Section 280 of the revenue act of 1924 is contained in Title II of that act, which title relates to income tax. In order, then, to determine the manner in which assessments of income tax for 1918, 1919, and 1920 are to be made, reference is had to Title II of the revenue act of 1924.

Section 274, which is a part of Title II of the revenue act of 1924, provides:

"SEC. 274. (a) If, in the case of any taxpayer, the commissioner determines that there is a *deficiency* in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

"(b) If the board determines that there is a *deficiency*, the amount so determined shall be assessed and shall be paid on notice and de-

mand from the collector. No part of the *amount determined as a deficiency* by the commissioner but disallowed *as such* by the board shall be assessed, * * *." (Italics ours.)

19 Section 273, which is a part of the same title and act, provides:

"SEC. 273. As used in this title the term 'deficiency' means—

"(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax."

Speaking more generally, the deficiency may be said to be the difference between the amount of tax imposed and the amount previously returned and/or paid by the taxpayer. It should be noted that section 273 makes no exception as to any deficiency. No distinction is made between a deficiency arising under one section of the title and that arising under any other section of the title. The manner in which "deficiency" is used in section 274, taken with its definition in section 273, constitutes that term all-embracing under that title. It includes any amount determined as a deficiency by the commissioner. The manner of the assessment and collection of all such deficiencies is controlled by the provisions of Title II of the revenue act of 1924 and is applicable to each and every section of that title not specifically excepted. That this is true is evidenced by the fact that Congress deemed it necessary, in a case intended to be excepted, to make express provision therefor. Such exception appears in section 278 of the revenue act of 1924, which provides, in part, as follows:

"SEC. 278. * * * (b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the revenue act of 1918 or the revenue act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

The above section provides an exception to the otherwise inclusive manner of assessment and collection of deficiencies generally under Title II. The statute provides no exception as to the manner of assessment and collection of deficiencies arising under the special assessment sections.

It must follow, then, that Congress intended that an appeal should lie to the board from a deficiency arising from a determination involving the special assessment provisions above referred to, unless the statute elsewhere makes it clear that the commissioner alone is vested with conclusive determinative authority by reason of discretionary powers granted to him, or unless it is made equally clear that the revenue act of 1924 has not modified the so-called "secrecy pro-

visions" in such manner as to give the board authority effectively to consider such appeals.

In support of such discretionary authority in the commissioner, which it is argued is unreviewable and gives rise to an implied exception in respect of deficiencies arising under the special assessment sections, Government counsel rely on the language employed in section 327 of the revenue acts of 1918 and 1921. Except for a slight change which has no bearing in this consideration, the language of that section is identical in both the acts referred to. Section 327 of the revenue act of 1918 provides in part:

"Sec. 327. That in the following cases the tax *shall be* determined as provided in section 328:

"(a) Where the commissioner is unable to determine the invested capital as provided in section 326;

"(b) In the case of a foreign corporation;

"(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

"(d) Where upon application by the corporation the commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328." (Italics ours.)

Let us examine this section. In the first place the determination under section 328 is mandatory under the conditions enumerated in the subdivisions of section 327. In subdivision (a) the condition is that the commissioner shall be unable to determine the invested capital as provided in section 326. It is not discretionary with him whether he shall be unable so to determine. It specifically makes his inability so to determine the test. If the commissioner confesses his inability in this respect and for that reason determines a deficiency in tax under section 328, and from such determination the taxpayer appeals, can it be reasonably argued that since the commissioner could not no one else may? In our opinion subdivision (a) does not confer such unreviewable discretion on the commissioner nor does it give rise to an implied exception in the statute. Subdivision (b) makes it mandatory that the tax shall be determined under section 328 in the case of a foreign corporation. No discretion is conferred on the commissioner by this subdivision. What we have just said relative to subdivision (a) is equally applicable to subdivision (c), except in so far as "unable to determine" is modified by "satisfac-

torily." This modification, however, supports the view above expressed because it connotes an ability to determine, partially at least, certain values which might, upon careful review, be completely determined.

Subdivision (d) is the principal reliance of Government counsel. Therein the condition is expressed that the commissioner "find" and so declare of record that an abnormality exists. This subdivision presupposes his ability to determine invested capital and the respective values of certain classes of property paid in for stock, in accordance with subdivisions (a) and (c). Thus we face the issue whether the use of the word "find" as here used vests the unreviewable discretion in the commissioner, contended for by Government counsel, and thereby creates an implied exception in the law relative to
21 appeals from deficiencies. If this issue be resolved affirmatively, then it would seem to follow irresistibly that a similar conclusion must be applied to a number of instances in the revenue act of 1924 wherein the commissioner, in pursuance of his official duties, is required to make determinations based upon findings made by him. A recital of some of these instances will disclose that the word "find" does not have the cogent significance argued for it.

In section 204 there is provided the basis for determining gain or loss from the sale or other disposition of property acquired by gift after December 31, 1920. In paragraph (2) of subdivision (a) it is provided that "if the commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the commissioner as of the date or approximate date at which, according to the best information that the commissioner is able to obtain such property was acquired by such doner or last preceding owner." The construction argued for by the Government would deprive the taxpayer of an appeal on the question of the fair market value of such property.

A similar duty is laid by statute on the commissioner in section 205 in determining the basis for inventories. An appeal would not lie from a deficiency predicated upon inventories taken on a basis prescribed by the commissioner, irrespective of the correctness of such basis, if the contention of the Government be sound in the instant appeal.

Another example is found in section 206 (b) with reference to production of evidence satisfactory to the commissioner with respect to a net loss. Such a deficiency was recently before the board in the Appeal of Carroll Chain Company, I. B. T. A. 38, in which appeal the commissioner conceded jurisdiction in the board.

Again, in section 216 (a), relating to the allowance of credits for the purpose of the normal tax, the commissioner is charged with determining to his satisfaction whether more than 50 per cent of the gross income of foreign corporations was derived from sources within the United States.

The authority in the commissioner to find, to fix, to determine, and the like, is found in many instances under prior revenue acts. This has not been held to confer an unreviewable discretionary power. The judgment of the commissioner has been reviewed by the courts in numerous cases of this character. The commissioner is required to determine March 1, 1913, value as a basis of depletion and depreciation. He is charged with a similar duty with reference to the value of legacies and decedents' estates under the estate tax provisions. He determines the value of property included in invested capital and likewise the value of capital stock under the capital stock tax provisions. In all of the instances referred to, as well as in many others of a similar character, the courts have undertaken to review the judgment of the commissioner.

It is clear and phraseology employed in section 327 was not intended as significant to the extent of creating an implied exception to the otherwise clearly expressed intendment of the statute relative to appeals.

22 The second proposition argued by Government counsel in support of the instant motion is that it was the intent of Congress to vest in the commissioner sole authority to fix rates in special assessment cases and compute the taxes thereunder, and that his action under such authority is unreviewable; that this intent on the part of Congress is made clear by the enactment of the so-called "secrecy provision" contained in section 3167 of the Revised Statutes as reenacted by section 1018 of the revenue act of 1924; that a consideration of an appeal involving such computations would necessitate making public the records of the commissioner, upon which such computations are based, in violation of section 3167 of the Revised Statutes referred to.

Section 1018 of the revenue act of 1924 provides, in part:

"SEC. 1018. Sections * * * 3167 * * * of the Revised Statutes, as amended, are reenacted without change as follows:

"'SEC. 3167. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever *not provided by law* to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person *except as provided by law*; and it shall be unlawful for any person to print or publish in any manner whatever *not provided by law* any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income returns; * * *.'" (Italics ours.)

From the reading of the foregoing it is apparent that Congress intended to provide exceptions to the general inhibition contained therein, and that these exceptions were to be those "provided by law." One notable and specific exception is contained in section 257 of the revenue act of 1924, which provides in part:

"SEC. 257. (a) Returns upon which the tax has been determined by the commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President. * * *

"(b) The commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such other places as he may determine, lists containing the name and the post-office address of each person making an income-tax return in such district, together with the amount of the income tax by such person."

Pursuant to the foregoing, the Secretary of the Treasury, with the approval of the President, on September 27, 1924, promulgated Treasury Decision 3638 providing regulations for giving effect to the statute.

Section 3167 of the Revised Statutes appears in the revenue act of 1918 in the same phraseology as above. On January 12,
23 1920, the commissioner, with the approval of the Secretary, promulgated Treasury Decision 2962, in which it is said:

"There are numerous provisions in the statutes constituting the doing or failure to do certain things, offenses against the United States, and providing for collecting unpaid taxes by suits in courts and for bringing suits to recover taxes and penalties wrongfully collected. These provisions would be of no avail were it held that the returns themselves, or certified copies thereof, provided for in section 822, Revised Statutes, could not be used by the Government as evidence in such litigation or in preparation for same. *Manifestly Congress did not, when it enacted section 3167, Revised Statutes, intend to defeat prosecutions and suits in court for which it has specifically provided.*

"Income returns filed with the department as public records of the department, and public records in the Treasury Department are of right available as evidence in litigation in court unless there is some statute making it unlawful to use them as such. (Citing judicial decisions.) As, therefore, the use of income returns or copies thereof in connection with litigation in court, where the United States Government is interested in the result, *is provided for by law*, such returns or copies may be furnished for use without a violation of the provisions of section 3167, Revised Statutes, as amended." (Italics ours.)

Rules and regulations are there prescribed for giving effect to the foregoing.

On June 30, 1921, the commissioner, with the approval of the Secretary, promulgated Treasury Decision 3188, amending Treasury Decision 2962 and Regulations 45 (1920 edition), article 1091. It is said therein:

"The original income return of an individual, corporation * * * or a copy thereof, may be furnished by the Commissioner of Internal Revenue to a United States attorney for use as evidence before a United States grand jury or in litigation in any court, where the United States is interested in the result, or for use in the preparation for such litigation, or to an attorney connected with the Department of Justice designated to handle such matters * * *. When an income return or copy thereof is thus furnished, it must be limited in use to the purpose for which it is furnished and is under no condition to be made public *except where publicity necessarily results from such use.*" (Italics ours.)

The same provisions are contained in Regulations 62, article 1091, promulgated under the revenue act of 1921.

We call attention to the foregoing to show that it has been a recognized policy of the Government under the law as contained in section 3167 of the Revised Statutes to make public the records of the Treasury Department in litigation specifically provided for by law. The law as contained in the revenue act of 1924 establishes the Board of Tax Appeals and provides that it shall be an independent agency in the executive branch of the Government. An agency for what purpose? Section 900 (e) provides, "The board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312." Having so provided, it would follow by necessary implication that the board is endowed with all the necessary authority to effectuate the purpose for which it was created. But Congress conferred this authority expressly rather than by implication. Subdivision (i) of section 900 of the act provides, in part:

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"(i) For the efficient administration of the functions vested in the board * * * any member * * * may administer oaths, examine witnesses, and require, by subpœna * * * (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing; (2) the taking of a deposition before any designated individual competent to administer oaths under this act; and (3) the answer in writing under oath to any question of fact submitted * * *."

Section 1025 (a) of the revenue act of 1924 provides:

"If *any* person is summoned under this act to appear, to testify, or to produce books, papers, *or other data*, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate proceedings to compel such attendance, testimony, or production of books, papers, or other data." (Italics ours.)

After conferring the authority and powers above outlined on the board, Congress in the same revenue act which reenacted section 3167 of the Revised Statutes provides in subdivision (h) of section 900 of the revenue act of 1924—

"Notice and opportunity to be heard shall be given to the taxpayer and the Commissioner * * *. Hearings before the board and its divisions shall be open to the public * * *. It shall be the duty of the board and of each division to make a report in writing of its findings of fact and decision in each case, and a copy of its report shall be entered of record and a copy furnished the taxpayer. * * * All reports of the board and its divisions and all evidence received by the board and its divisions * * * shall be public records open to the inspection of the public * * *."

We are of the opinion that Congress intended, and has clearly indicated that the general secrecy provisions of the law should not have the effect of ousting jurisdiction of appeals specifically granted by it to this board. It is apparent that Congress intended to confer on the board the power necessary to effectuate the purposes for which it was created. Indeed it is fundamental that every court or tribunal has inherent power to do all things that are reasonably necessary to the administration of justice within the scope of its jurisdiction. Compelling the production of all evidence pertinent and material to a cause at issue before it is unquestionably one of such powers.

We are of opinion that jurisdiction is conferred on this board to hear and determine appeals arising out of the special assessment provisions heretofore referred to, and that in granting such jurisdiction the provisions of the revenue act of 1924 are clear and unambiguous and not susceptible to the restrictions, limitations, and exceptions contended for by Government counsel. However, since this contention has been so earnestly urged it may not be amiss
25 to aid our interpretation of such intent by reference to the history of the legislation creating the board. The United States Circuit Court of Appeals, Eighth Circuit, in the case of United States v. Ninety Nine Diamonds et al., 139 Fed. 961 at page 966, said:

"The clear words of the statute, their certain meaning, the legal requirement that all the terms of the section which are consistent with each other shall be given effect, *a consideration of the subject of the legislation, of the object which the Congress was seeking to attain, and of the evil which it was endeavoring to remedy* point unerringly to the same result." (Italics ours.)

(Writ of certiorari denied by the Supreme Court, 201 U. S. 645; 50 L. Ed. 903.)

The object which Congress sought to attain, the evil it endeavored to remedy, and the consideration given the subject of the legislation creating this board are succinctly stated in the reports of the House and Senate committees, from which the following extracts are quoted:

"The committee commends the establishment of a board of tax appeals to which a taxpayer may appeal prior to the payment of *an additional assessment of income, excess-profits, war-profits*, or estate taxes." (Italics ours.) (House Report No. 179, p. 7.)

"Under the existing law a taxpayer prior to the payment of his tax may appeal to the commissioner, who has established the Committee on Appeals and Review, to determine these appeals for him. The objections that have been raised to this precedure are four: (1) The appeal is from the action of the Bureau of Internal Revenue but is taken to a committee in and a part of the bureau. It is urged that such an appeal does not involve a review by an impartial outside body, such as the taxpayer is entitled to prior to payment of the tax. (2) In the hearing on the appeal the person who is to decide the appeal acts both as advocate and judge, since he must both protect the interests of the Government and decide the questions involved. Such conditions do not insure an impartial determination of the case. (3) If the decision on the appeal is in favor of the Government, the taxpayer has the right to test the correctness of the decision in the courts, but if the decision is in favor of the taxpayer the action of the bureau is final and the correctness of the decision can never be tested in the courts. It is contended that this condition results in the decision of most doubtful points in favor of the Government. (4) The taxpayer is usually forced to come to Washington for the hearing on his appeal, an expensive and burdensome procedure." (Id. pp. 7 and 8.)

"To meet the objections given above, the committee recommends that there be established a board of tax appeals, * * * to hear *all appeals from the assessment of additional income, war-profits, excess-profits*, and estate tax. * * * Both the Government and the taxpayer will appear before the board and present their cases, and the decision of the board will be final as to the amount of tax to be paid." (Id., p. 8.) (Italics ours.)

"The bill provides for the establishment of a board of tax appeals to which the taxpayer may appeal prior to the pay-
26 ment of *an additional assessment of income, excess-profits*, war-profits, or estate taxes. * * *

"Under the existing law, a taxpayer prior to the payment of his tax may appeal to the commissioner, who has established the Committee on Appeals and Review to determine these appeals for him. * * *

"Under the provision of the proposed bill creating a board of tax appeals the taxpayer may, prior to the payment of the *additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the board of tax appeals* and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal both the Government and the taxpayer will appear before the board to present their cases, with the result that each member of the board will sit solely as judge and not as

both judge and advocate. * * * *This proposal meets all the objections that have been raised as to the existing system* and at the same time provides for a flexible and informal procedure which will permit the board to determine expeditiously the cases brought before it on appeal." Senate Report 398, pp. 8 and 9. (Italics ours.)

We are of opinion that the language employed in the revenue act of 1924 confers on this board jurisdiction of appeals involving deficiencies arising out of the application by the commissioner of the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921 as well as deficiencies arising out of a failure by the commissioner to apply those provisions in proper cases. The motion of the solicitor on behalf of the commissioner is denied.

Exhibit F to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Company, Cincinnati, Ohio, Docket No. 46

APPLICATION FOR SUBPŒNA TO ANSWER INTERROGATORIES

To the UNITED STATES BOARD OF TAX APPEALS:

Application is hereby made for the issuance of a subpœna requiring the Commissioner of Internal Revenue, or some other official or person subordinate to the commissioner, having knowledge of, and/or access to, the records in the commissioner's office, to be designated by the commissioner for that purpose, to answer fully in writing under oath each of the several interrogatories hereto annexed as a part of this application.

The reason why it is desired to have the sworn answers of the commissioner or such designated person to the said interrogatories are:

The taxpayer was in the years 1918 and 1919 engaged in the business of manufacturing and selling machine tools.

One of the grounds of this taxpayer's appeal is that it is entitled to have its excess-profits tax liability for the years 1918 and 1919 computed under the provisions of sections 327 and 328 of the revenue act of 1918, and, in order to sustain the burden of proving the
27 amount of its correct tax liability, the taxpayer must show the rate of excess-profits tax for the years 1918 and 1919 of representative corporations engaged in a trade or business like or similar to that of this taxpayer.

The rate of excess profits tax of such representative corporations is evidence material and relevant for the purpose of proving the rate and amount of this taxpayer's tax.

This taxpayer has been diligent in seeking proof of these material facts from other sources and by other means, to this end having written a great number of letters to corporations in various parts

of the United States which were engaged in the business of manufacturing and selling machine tools. It has lately received letters in some cases and ex parte affidavits in others, in some cases showing only fragments of the requested data, some of which was expressed in percentages of ratios rather than exact amounts; the majority of the corporations written to or called upon declined to give the information requested, or failed to answer the taxpayer's letters.

This taxpayer has only such knowledge of the said facts sought to be proved by answers to the aforesaid interrogatories and only such information as is contained in certain letters and ex parte affidavits received from other taxpayers as above explained, which letters and affidavits this taxpayer hereby offers to introduce as evidence in this case if the commissioner will agree to their admission as proof of the facts therein set forth.

Attempts to prove the said facts by other means, even if successful, would entail great expense and hardship to this taxpayer and cause great annoyance and inconvenience to numerous disinterested persons and unwilling witnesses, besides unnecessarily burdening this board with a multitude of details such as the filing and reading of numerous applications and motions and issuing numerous orders and subpœnas.

All the facts sought to be proved by means of answers to the said interrogatories hereto annexed are within the official knowledge of the Commissioner of Internal Revenue and are not within the knowledge of any other person whomsoever outside the commissioner's office.

Counsel for this taxpayer believes, and, so believing, avers that all the corporations whose names are listed in the said annexed interrogatories filed income and profits-tax returns for the years 1918 and 1919, and that all of said corporations were engaged in the business of manufacturing and selling machine tools in those years.

It is desired to have the annexed interrogatories answered fully in writing by the commissioner or other person designated by him for that purpose, and such answers subscribed and sworn to by the commissioner or such designated person before the board, or a member thereof, or before any person authorized by law to administer oaths in the District of Columbia, and the answers so sworn and subscribed filed with the board within fifteen days from service of the subpœna, or within such other convenient and reasonable time as may be fixed by the board, the said answers to be subscribed, sworn to, and filed in accordance with such requirements as the board may deem fit to prescribe.

28 It is respectfully requested that the case be continued and the commissioner be given time within which to answer said interrogatories.

(Signed) J. R. SHERROD,
922 Southern Building, Washington, D. C.,
Counsel for Taxpayer.

Application dated March 17, 1925.

Interrogatories to be answered in writing under oath by the Commissioner of Internal Revenue or a subordinate of his office designated by him for that purpose

NOTE.—The "data sheet" referred to in the following interrogatories means the comparative statistics data sheet, Treasury Department, Internal Revenue Bureau, Form 7365 of August, 1921, ordinarily used in compiling comparative data for the purpose of determining excess profits tax in special cases under the provisions of section 328 of the revenue act of 1918.

The "data" referred to in the following interrogatories means the data called for and ordinarily shown on the above-described "data sheet."

The "card records" referred to in the following interrogatories means the cards ordinarily used in the special assessment section of the Income Tax Unit showing the above described "data" of particular corporations which are used as comparatives in compiling the above described "data sheet."

No. 1. Please state whether or not the application of Oesterlein Machine Company for special assessment for the years 1918 and 1919 has been considered by the commissioner to the extent of comparing the taxpayer with other corporations.

No. 2. Please state whether or not a "data sheet" was prepared in this case covering the years 1918 and 1919, and, if so, how many "data sheets" were prepared for each year.

No. 3. If one or more of such "data sheets" have been prepared for either 1918 or 1919, please submit as the answer to this interrogatory true copies of each of such "data sheets."

No. 4. Please state the names and addresses of each of the corporations whose "data" are shown on the "data sheets" referred to in the foregoing interrogatories, and state the nature of the business in which each was engaged in the years 1918 and 1919, as shown by the records in the commissioner's office.

No. 5. As the answer to this interrogatory, please submit a true copy of each of the cards, "card records," or similar records, if any, showing the 1918 and 1919 "data" of each of the following corporations:

Oliver Machine Company, Grand Rapids, Indiana.
The J. N. LaPointe Company, New London, Connecticut.
Van Werman Machine Tool Company, Springfield, Massachusetts.
Ohio Machine Tool Company, Kenton, Ohio.
Willard Machine Tool Company, Covington, Kentucky.
Carlton Machine Tool Company, Cincinnati, Ohio.
Hoefer Manufacturing Company, Freeport, Illinois.
29 Gould & Eberhardt, Newark, New Jersey.
Garvin Machinery Company, New York City, New York.
The John Steptoe Company, Cincinnati, Ohio.
J. D. Blount & Company, Everett, Massachusetts.
Sreaves, Slussmann Tool Company, Cincinnati, Ohio.

No. 6. If there are no cards, "card records," or similar records for any one or more of the corporations listed in the preceding interrogatory, please give the following information as shown by records in the commissioner's office separately for the years 1918 and 1919 for each such corporations, such information to be taken from the last return filed by each corporation for the years 1918 and 1919, unless the figures in such last return have been adjusted or revised by the commissioner, in which event give the adjusted or revised figures, and where the information is not so shown the same to be taken from any other records in the commissioner's office upon which the information may appear.

(a) Name and address of the corporation.
(b) Date of organization.
(c) Invested capital.
(d) Statutory intangibles.
(e) Adjustments for inadmissibles.
(f) Interest-bearing indebtedness.
(g) Noninterest-bearing indebtedness to stockholders.
(h) Gross sales.
(i) Other income.
(j) Ordinary and necessary expenses.
(k) Compensation of officers.
(l) Repairs.
(m) Interest.
(n) Taxes.
(o) Bad debts.
(p) Exhaustion, wear, and tear (including obsolescence).
(q) Amortization of war facilities.
(r) Depletion.
(s) Special deductions from income.
(t) Net income.
(u) Net income previous year.
(v) Average net income pre-war period.
(w) Average invested capital pre-war period.

Exhibit G to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Company, Docket No. 46

SUBPŒNA TO ANSWER IN WRITING UNDER OATH CERTAIN QUESTIONS OF FACT

The President of the United States of America to David H. Blair, Commissioner of Internal Revenue, greeting:

You are hereby commanded in accordance with the provisions of section 900 (i) of the revenue act of 1924 to answer in writing

under oath the questions of fact in the schedule annexed hereto
30 and to file your answers to said questions with this board on or
before the 28th day of March, 1925.

By order of the United States Board of Tax Appeals this 21st day
of March, 1925.

J. S. Y. IVINS, *Member.*

A true copy.
Teste:
[SEAL.]

ROBERT C. TRACY,
Secretary U. S. Board of Tax Appeals.

Schedule of questions to be answered in writing under oath

NOTE.—The "data sheet" referred to in the following interroga-
tories means the comparative statistics data sheet, Treasury Depart-
ment, Internal Revenue Bureau, Form 7385 of August, 1921, ordi-
narily used in compiling comparative data for the purpose of deter-
mining excess-profits tax in special cases under the provisions of
section 328 of the revenue act of 1918.

The "data" referred to in the following interrogatories means
the data called for and ordinarily shown on the above-described
"data sheet."

The "card records" referred to in the following interrogatories
means the cards ordinarily used in the special assessment section of
the Income Tax Unit showing the above-described "data" of par-
ticular corporations which are used as comparatives in compiling
the above-described "data sheet."

No. 1. Please state whether or not the application of Oesterlein
Machine Company for special assessment for the years 1918 and
1919 has been considered by the commissioner to the extent of com-
paring the taxpayer with other corporations.

No. 2. Please state whether or not a "data sheet" was prepared in
this case covering the years 1918 and 1919, and, if so, how many
"data sheets" were prepared for each year.

No. 3. If one or more of such "data sheets" have been prepared
for either 1918 or 1919, please submit as the answer to this interroga-
tory true copies of each of such "data sheets."

No. 4. Please state the names and addresses of each of the cor-
porations whose "data" are shown on the "data sheets" referred
to in the foregoing interrogatories, and state the nature of the busi-
ness in which each was engaged in the years 1918 and 1919, as shown
by the records in the commissioner's office.

No. 5. As the answer to this interrogatory, please submit a true
copy of each of the cards, "card records," or similar records, if
any, showing the 1918 and 1919 "data" of each of the following
corporations:

Oliver Machinery Company, Grand Rapids, Indiana.
The J. N. LaPointe Company, New London, Connecticut.
Van Norman Machine Tool Company, Springfield, Massachusetts.
Ohio Machine Tool Company, Kenton, Ohio.
Willard Machine Tool Company, Covington, Kentucky.
Carlton Machine Tool Company, Cincinnati, Ohio.
Hoefer Manufacturing Company, Freeport, Illinois.
Gould & Eberhardt, Newark, New Jersey.
31 Garvin Machinery Company, New York City, New York.
The John Steptoe Company, Cincinnati, Ohio.
J. D. Blount & Company, Everett, Massachusetts.
Greaves, Slussman Tool Company, Cincinnati, Ohio.

No. 6. If there are no cards, "card records," or similar records, for any one or more of the corporations listed in the preceding interrogatory, please give the following information as shown by records in the commissioner's office separately for the years 1918 and 1919 for each such corporation, such information to be taken from the last return filed by each corporation for the years 1918 and 1919, unless the figures in such last return have been adjusted or revised by the commissioner, in which event give the adjusted or revised figures, and where the information is not so shown the same to be taken from any other records in the commissioner's office upon which the information may appear.

(a) Name and address of the corporation.
(b) Date of organization.
(c) Invested capital.
(d) Statutory intangibles.
(e) Adjustments for inadmissibles.
(f) Interest-bearing indebtedness.
(g) Noninterest-bearing indebtedness to stockholders.
(h) Gross sales.
(i) Other income.
(j) Ordinary and necessary expenses.
(k) Compensation of officers.
(l) Repairs.
(m) Interest.
(n) Taxes.
(o) Bad debts.
(p) Exhaustion, wear, and tear (including obsolescence).
(q) Amortization of war facilities.
(r) Depletion.
(s) Special deductions from income.
(t) Net income.
(u) Net income previous year.
(v) Average net income pre-war period.
(w) Average invested capital pre-war period.

Exhibit H to petition

TREASURY DEPARTMENT,
Washington, March 28, 1925.

SOL:R
UNITED STATES BOARD OF TAX APPEALS,
Investment Building, Washington, D. C.

IN RE: APPEAL OF OESTERLEIN MACHINE COMPANY, CINCINNATI, OHIO.
DOCKET NO. 46

SIRS: I have been served with an order issued by the board on March 21, 1925, to which order is attached certain interrogatories, which interrogatories I am directed by said order to answer.

32 I regret that it is necessary to inform you that the proper discharge of the duties of my office will not, in my opinion, admit the furnishing of the information called for in said interrogatories.

The reasons prompting this decision are as follows:

(1) The information called for in said interrogatories is communicated to me as Commissioner of Internal Revenue in the strictest confidence and is privileged.

(2) Answer to the interrogatories will divulge information and data from the records in my office, the publication of which is prohibited by the provisions of section 3167 of the Revised Statutes.

Section 3167, Revised Statutes, reenacted without change as part of section 1018 of the revenue act of 1924, makes it unlawful for any official or employee of the United States to divulge or make known in any manner whatever, not provided by law, the amount or source of income, profits, losses, expenditures, or any part thereof, set forth or disclosed in income returns or to permit any income return or copy thereof, or any book containing any abstract or part thereof to be seen or examined by any person except as provided by law.

Congress further emphasized the safeguard that should be thrown around inspection of tax returns by its enactment of section 257 (a) of the revenue act of 1924, which provides that the returns upon which the tax has been determined by me shall constitute public record, but that they shall be open to inspection only upon order of the President under rules and regulations prescribed by the Secretary and approved by the President. Certain definite exceptions are made by that section—for instance, the Committee on Ways and Means of the House of Representatives, Committee on Finance of the Senate, and certain others that are specifically mentioned.

Section 900 (h) of the revenue act of 1924 provides in part as follows:

"All reports of the board and its divisions and all evidence received by the board and its divisions (including, in cases where

the oral testimony is reduced to writing, the transcript thereof) shall be public records open to the inspection of the public."

Section 900 (h) also provides that—

"Hearings before the board and its divisions shall be open to the public."

In view of the two provisions last quoted, it is apparent that the returns of taxpayers used by me as comparatives in fixing the rate of profits tax to be assessed in the case of the appellant taxpayer, could not be used by your board without making public and a matter of public record the details of the returns so used.

In arriving at this decision I am not unmindful of the provisions of section 900 (i) of the revenue act of 1924. However, it is my opinion there is nothing in this section, when considered in connection with the other provisions of law, which authorizes me to divulge the information sought to be secured by the interrogatories referred to in your order of March 21, 1925. Indeed, I believe
33 I am positively prohibited from divulging information of this character concerning taxpayers other than the taxpayer whose appeal is under consideration.

Respectfully,

(Sgd.) D. H. BLAIR,
Commissioner.

[Copy]

Commissioner.

Exhibit I to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Company, Cincinnati, Ohio. Docket No. 46

MOTION TO PROCEED IN COURT

Whereas on March 16, 1925, the taxpayer in the above-entitled appeal made formal application to the Board of Tax Appeals for a subpœna requiring Commissioner of Internal Revenue David H. Blair to answer in writing under oath certain questions of fact; and

Whereas on March 19, 1925, hearing was had before division No. 1 of the board on the aforesaid application, and it appearing to the board that the facts sought to be proved by the aforesaid answers were material to the issue in this appeal and necessary to a determination of the appeal by the board the taxpayer's application was granted; and

Whereas on March 21, 1925, in accordance with order of the board granting the aforesaid application, the board issued a subpœna directed to Commissioner of Internal Revenue David H. Blair, requiring him to answer in writing under oath certain questions of fact in schedule thereto annexed, under the provisions of

section 900 (i) of the revenue act of 1924, and to file answers to said questions with the board on or before March 28, 1925; and

Whereas the said David H. Blair, Commissioner of Internal Revenue, has refused to obey the subpœna and failing to file answers in writing under oath to said questions of fact as required by said subpœna, and still refuses so to do, but has addressed to the Board of Tax Appeals a communication under date of March 28, 1925, stating his opinion that the proper discharge of his official duties would not admit furnishing the information called for by the subpœna, and setting forth certain alleged reasons in support of his opinion; and

Whereas the aforesaid failure and refusal of said Commissioner Blair to answer and obey the subpœna deprives this taxpayer of of its right under the law to a hearing on the merits of the tax controversy raised in the aforesaid appeal and deprives the taxpayer of its right to evidence material, relevant, and necessary to sustain the taxpayer's contention in said appeal; and

34 Whereas the aforesaid failure and refusal is arbitrary, illegal, and in violation of section 900 of the revenue act of 1924; and

Whereas the board is given power under the provisions of section 1025 (a) of the revenue act of 1924 to compel obedience to subpœna issued by the board by applying to the court for appropriate process;

Now, therefore, the taxpayer, by counsel, moves the Board of Tax Appeals to apply to the Supreme Court of the District of Columbia for appropriate process to compel the said Commissioner Blair to obey subpœna of the board and to make answer in writing under oath to the questions of fact as required by the aforesaid subpœna and to file the same with the board on or before a date to be specified by the board or the court.

(Signed) ROBERT N. MILLER,
(Signed) J. ROBERT SHERROD,
(Signed) EDWARD MCCARTHY,
Counsel for Taxpayer.

MILLER & CHEVALIER,
Of Counsel.

WASHINGTON, D. C., *April 13, 1925.*

Exhibit J to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Co. Docket No. 46

ORDER DENYING TAXPAYER'S "MOTION TO PROCEED IN COURT"

Counsel for the taxpayer has filed the annexed motion entitled "Motion to proceed in court."

On March 16, 1925, the taxpayer filed formal application to the board for a subpœna requiring the commissioner to answer in writ-

ing under oath certain questions of fact. On March 19, 1925, hearing was had on the application (J. R. Sherrod, Esq., for the application, Robert A. Littleton, Esq., opposed), and it appearing to the board that the facts sought to be proved by the aforesaid answers were material to the issue and necessary to a determination of the appeal, the taxpayer's application was allowed, and on March 21, 1925, the board issued its subpœna under the provisions of section 900 (i) of the revenue act of 1924, directed to the Commissioner of Internal Revenue, David H. Blair, requiring him to answer in writing under oath certain questions of fact specified in schedule thereto annexed and to file the answers with the board on or before March 28, 1925. The commissioner has declined to file the answers as required by the subpœna and has addressed a communication to the Board of Tax Appeals dated March 28, 1925, stating his opinion that the proper discharge of his official duties would not admit furnishing the information called for by the subpœna, his reasons being, as stated in the communication, (1) that the information was communicated to him as Commissioner of Internal Revenue in strictest confidence and is privileged, and (2) that the answers would divulge information and data from the
35 records of his office, the publication of which is prohibited by the provisions of section 3167, Revised Statutes.

The reasons given by the commissioner for his failure to comply with the subpœna were urged by counsel for the commissioner in support of the commissioner's contention that the board had no jurisdiction in special assessment cases and were carefully considered by the board in arriving at the conclusion that it does have jurisdiction in this class of cases. (Appeal of Oesterlein Machine Company, 1 B. T. A. 159.)

The taxpayer now moves the board to apply to the Supreme Court of the District of Columbia under section 1025 (a) of the revenue act of 1924 for appropriate process to compel the commissioner to obey the board's subpœna and to make answer in writing under oath to the questions of fact specified in the aforesaid subpœna and to file the same with the board on or before a date to be specified by the board or the court.

The taxpayer's motion has been considered ex parte and without a hearing thereon.

Without deciding whether, in any case, section 1025 (a) of the revenue act of 1924 authorizes the board to institute proceedings in court as a party plaintiff for the purpose of compelling obedience to its subpœna, it is sufficient for the present case to say that, in the opinion of the board, no such necessity appears. The purpose of section 1025 (a) is to afford relief primarily to the party at whose instance the subpœna is issued. The subpœna in the present case was issued on the taxpayer's application. The taxpayer is the party in interest and the party primarily aggrieved, and as such would be the logical party plaintiff to apply to the court for appropriate process to secure its rights under the law. The taxpayer complains that its

rights are violated by the commissioner's failure and refusal to comply with the subpœna; that it is deprived of a hearing to which it is entitled; and that it is deprived of evidence material, relevant, and necessary to sustain the contention made in its appeal. If this be true, the rights violated are primarily those of the taxpayer, and we think it is the taxpayer who should seek the aid of the court rather than this board. Therefore

It is hereby ordered that the annexed motion of the taxpayer be denied.

Dated Washington, D. C., April 27, 1925.

(Signed) J. S. Y. IVINS,
Member U. S. Board of Tax Appeals.

In Supreme Court of District of Columbia

Rule to show cause

Filed May 25, 1925

* * * * * * *

Upon consideration of the petition filed in the above-entitled case and the exhibits attached thereto, it is by the court this 25th day of May, 1925,

Ordered that the defendants, David H. Blair, Commissioner of Internal Revenue, and the United States Board of Tax Appeals, and each of them, show cause, if any they have, in this court
36 on the 5th day of June, 1925, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, why an order or decree should not be entered herein requiring the respondent, David H. Blair, Commissioner of Internal Revenue, to forthwith obey the subpœna issued by the respondent, United States Board of Tax Appeals, to the said David H. Blair, Commissioner of Internal Revenue, requiring him to produce before said board the data specified and called for in said subpœna and the schedule attached thereto, and to answer under oath the questions submitted by said board along with said subpœna, calling for information necessary and proper to enable the said board to pass upon and determine the rights of the petitioner in its appeal pending before said board, and otherwise perform the duties imposed upon it by law, provided a copy of the petition herein and of this order be served upon defendants on or before June 1, 1925.

A. A. HOEHLING, *Justice.*

In Supreme Court of District of Columbia

Answer of Defendant David H. Blair, Commissioner of Internal Revenue, to the Rule to Show Cause

Filed June 5, 1925

* * * * * * *

The defendant, David H. Blair, Commissioner of Internal Revenue, reserving unto himself the benefit of all manner of objections

and exceptions to the errors and insufficiencies of the petition filed herein and to the jurisdiction of the court in the premises, for answer to the rule to show cause issued herein, says:

1. He admits that he is the Commissioner of Internal Revenue of the United States and that he is temporarily residing in the District of Columbia.

2. He admits that on August 6, 1923, a tax letter was issued setting forth a revised computation of petitioner's taxes for the years 1918, 1919, and 1920, as set forth in paragraph 15 of the petition filed herein, except that the tax for the year 1920 was therein shown to be $182.45, and not $102.45 as set forth in said paragraph 15.

3. He denies that his failure and refusal to disclose the information as to income-tax returns of certain corporations sought to be elicited by the petitioner is arbitrary, wrongful, and illegal, as alleged in paragraph 29½ of the petition. And he avers that, on the contrary, he is prohibited by section 3167 of the Revised Statutes of the United States as reenacted in section 1317 of the revenue act of 1918, in section 1311 of the revenue act of 1921, and in section 1018 of the revenue act of 1924, and that by subdivision (c) of section 328 of the revenue acts of 1918 and 1921 he is prohibited from making public or disclosing such information except where required by either House of Congress.

4. The defendant, David H. Blair, Commissioner of Internal Revenue, further denies that his failure and refusal to disclose and make public the confidential information sought to be elicited by the petitioner is inconsistent with his action in the case of another and
37 different appeal heard before the Board of Tax Appeals. He avers that in the one case referred to, the Citizens Underwriters' Agency, the sole question was whether the taxpayer was a personal service corporation within the provisions of section 200 and subdivision (e) of section 218 of the revenue act of 1918, and that, in order to determine whether the income of the taxpayer was to be ascribed primarily to the activities of the principal owners or stockholders who were themselves regularly engaged in the active conduct of the affairs of the taxpayer, as provided in the statute, it was necessary to develop not only the sources of income of the taxpayer corporation itself but the various activities of the stockholders. He avers that in the case of personal-service corporations the corporation itself pays no income tax, but the tax is included in the individual returns of the several stockholders and is paid by them as in the case of a partnership. He further avers that the returns introduced were those of the stockholders of the taxpayer; that the stockholders whose returns were introduced in evidence were present and were sworn as witnesses, and voluntarily and without objection or claim to privilege testified as to the contents of their individual returns. And he further avers that in the other case referred to by the petitioner, the Denholm McKay Company, the question was as to the allowance of a deduction growing out of a transaction between two corporations with interlocking directorates, the

stock of each of which corporations was held by practically the same person, and that the introduction of the returns of both corporations was necessary to disclose the exact relationship between two corporations and the payment of rentals from one corporation to the other, and that the officers of the taxpayer were present and made no objection. He is advised and believes, and so believing avers, that what was done in the two cases referred to can not control or affect his compliance with the statutory provision prohibiting his disclosing and making public the confidential information sought to be obtained by the petitioner.

5. He denies that it was and is the duty of the Board of Tax Appeals, and that under the law it was incumbent upon the said board, in order to enable it fully to perform the functions for which it was created, as alleged in paragraph 30 of the petition, to procure the defendant David H. Blair, Commissioner of Internal Revenue, to disclose and make public the income-tax returns of corporations other than the petitioner and thus to violate the express statutory provision prohibiting such disclosure.

6. He admits that the tax determined by him for the year 1918 was computed in part on the basis of facts which have not been disclosed to the Board of Tax Appeals or to the petitioner, and that he has not disclosed to the Board of Tax Appeals or the petitioner the facts upon which he determined that petitioner's income tax for the year 1919 should not be computed under the provisions of section 328 of the revenue act of 1918 as alleged in paragraph 32 of the petition. He avers that he is prohibited by the statutory provisions heretofore cited from making such disclosure, and that his sole purpose in refusing to make such disclosure was to comply with the statutory provisions referred to.

7. He denies, as averred in paragraph 34 of the petition, that the corporations whose income-tax returns the petitioner seeks to
38 have disclosed are representative corporations and are similarly circumstanced as the petitioner with respect to gross income, net income, profits per unit of business transacted and capital employed, and the amount and rate of war profits or excess profits.

8. He denies that the facts sought to be proved by answers to the interrogatories served upon him are not within the knowledge of any other person outside the office of the Commissioner of Internal Revenue as alleged in paragraph 35 of the petition. He avers that the corporations named are in possession of this information, and he is informed and believes, and so believing avers, that the corporations whose income-tax returns it is sought to have disclosed are necessary parties to this proceeding.

9. He admits all of the other allegations of the petition not herein specifically denied.

10. Further answering the rule to show cause, the defendant, David H. Blair, Commissioner of Internal Revenue, is advised by counsel, and therefore avers, that the rule to show cause herein was inadvertently issued in that by said rule plaintiff seeks no inter-

locutory relief or relief pendente lite, but seeks only the final relief prayed in the bill of complaint.

Wherefore, having fully answered the rule to show cause issued herein, the defendant, David H. Blair, Commissioner of Internal Revenue, prays that the rule to show cause be discharged with costs.

DAVID H. BLAIR,
Commissioner of Internal Revenue.

PEYTON GORDON,
United States Attorney.
VERNON E. WEST,
Assistant United States Attorney.
CHAS. T. HENDLER,
Special Attorney, Internal Revenue,
Attorneys for defendant, David H. Blair.

[*Duly sworn to by David H. Blair. Jurat omitted in printing.*]

In Supreme Court of District of Columbia

Motion to dismiss

Filed June 5, 1925

* * * * * * *

Now comes the defendant, David H. Blair, and moves to dismiss the petition filed herein, for the following reasons:

1. The petitioner has a plain, adequate, and complete remedy at law.

39 2. The defendant, David H. Blair, Commissioner of Internal Revenue, is prohibited by section 3167 of the Revised Statutes of the United States, as reenacted in section 1317 of the revenue act of 1918, in section 1311 of the revenue act of 1921, and in section 1018 of the revenue act of 1924, and by subdivision (c) of section 328 of the revenue acts of 1918 and 1921, from making public or disclosing such information except where required by either House of Congress.

3. That the United States Board of Tax Appeals has no jurisdiction to review the action of the Commissioner of Internal Revenue in fixing a rate in compliance with the law in special assessment cases.

4. That the United States Board of Tax Appeals has no jurisdiction to review the action of the Commissioner of Internal Revenue in granting or refusing to grant special assessment under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921, and that therefore the testimony sought to be elicited, if taken, would serve no purpose.

5. That the taxpayers the details of whose income tax returns it is sought to compel the defendant David H. Blair, Commissioner

of Internal Revenue, to disclose and make public would be injuriously affected by such disclosure, and they are necessary parties to this proceeding.

PEYTON GORDON,
United States Attorney,
VERNON E. WEST,
Assistant United States Attorney,
CHAS T. HENDLER,
Special Attorney, Internal Revenue,
Attorneys for the Defendant David H. Blair.

In Supreme Court of District of Columbia

Decree and note of appeal

Filed June 29, 1925

* * * * * * *

This cause coming on to be heard the 19th day of June, 1925, on the petition and rule to show cause, and the answer to said rule, and motion to dismiss filed by the defendant Blair, and after argument and consideration thereof, it is this 29th day of June, 1925,

Ordered and decreed:

1. That the motion to dismiss be, and the same is hereby, denied and overruled.

And the parties hereto having agreed that the answer of the defendant Blair to the rule may be taken and considered as the answer to the petition filed herein, it is further ordered, adjudged, and decreed:

2. That the defendant David H. Blair, Commissioner of Internal Revenue, be, and he is hereby, ordered and commanded to obey forthwith the subpœna of the defendant United States Board of Tax Appeals issued and served upon him on the 21st day of March, 1925, in the matter of the appeal of the Oesterlein Machine Company pending before said board and designated as No. 46 on the
40 docket of said board, and forthwith to submit to and file with said Board of Tax Appeals the answers in writing under oath to the questions of fact specified in said subpœna and schedule thereto annexed.

A. A. HOEHLING, *Justice.*

No objection as to form:
VERNON E. WEST,
Ass't U. S. Atty., Atty. for Defendants.

At the time of signing the above decree the defendant David H. Blair, Commissioner of Internal Revenue, noted an exception thereto and in open court noted an appeal therefrom to the Court of Appeals of the District of Columbia.

A. A. HOEHLING, *Justice.*

In Supreme Court of District of Columbia

Assignments of error

Filed July 10, 1925

* * * * * * *

Now comes the defendant, David H. Blair, Commissioner of Internal Revenue, and assigns as error the following:

1. That the court erred in overruling this defendant's motion to dismiss the bill of complaint.
2. That the court erred in entering the final decree herein granting the relief prayed.
3. That the court erred in not holding that the Board of Tax Appeals is without jurisdiction to review, reverse, and control the determination of the Commissioner of Internal Revenue made in the exercise of the judgment and discretion committed to him by Congress in the provisions of sections 327 and 328 of the revenue act of 1918.
4. That the court erred in not holding that the equity court was without jurisdiction to issue a mandatory injunction to compel the Commissioner of Internal Revenue to violate the provisions of section 3167 of the Revised Statutes.
5. That the court erred in not holding that the taxpayers, the details of whose income-tax returns were sought to be disclosed and made public, are necessary and indispensable parties to this proceeding.

PEYTON GORDON,
United States Attorney,
Attorney for Defendant David H. Blair.

In Supreme Court of District of Columbia

Pracipe for transcript of record

Filed July 10, 1925

* * * * * * *

The clerk will please prepare a transcript of record on appeal to the Court of Appeals of the District of Columbia in the above-entitled cause and include therein the following:

1. Petition or bill of complaint.
2. Rule to show cause.
3. Motion to dismiss bill.

41 4. Answer to rule to show cause.

5. Final decree.
6. Note of appeal.
7. Assignments of error.
8. This designation.

PEYTON GORDON,
United States Attorney,
Attorney for Defendant David H. Blair.

Service of copy of above designation acknowledged this 9th day of July, 1925.

HAMILTON & HAMILTON,
Attorneys for Plaintiff.

[Clerk's certificate to foregoing transcript omitted in printing.]

42 [Minute entry of argument and submission Oct. 11, 1926, omitted in printing.]

43 In the Court of Appeals of the District of Columbia

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE
appellant
vs.
OESTERLEIN MACHINE COMPANY, A CORPORATION
No. 4420

Opinion

Before MARTIN, Chief Justice; ROBB and VAN ORSDEL, Associate Justices.

Mr. Justice Van Orsdel delivered the opinion of the court:

VAN ORSDEL, Associate Justice. This appeal is from a decree of the Supreme Court of the District of Columbia ordering and commanding David H. Blair, Commissioner of Internal Revenue, hereafter for convenience referred to as the commissioner, to obey the subpœna of the defendant, United States Board of Tax Appeals, hereafter referred to as the board, issued and served upon him in the appeal of the appellant company pending before said board. The commissioner was ordered by the decree "forthwith to submit to and file with said Board of Tax Appeals the answers in writing under oath to the questions of fact specified in said subpœna and schedule thereto annexed."

The matter in issue involved a finding by the commissioner that appellant company was deficient in payment of income and profit taxes for the years 1918, 1919, and 1920 in the net sum of $1,126.37. Appeal was accordingly taken to the Board of Tax Appeals created by section 900 of the revenue act of 1924, 43 Stats. 336.

In the course of the proceedings before the board the subpœna in question was issued calling upon the commissioner to answer interrogatories in writing under oath touching the evidence, data, and information on record in his office upon which he based his finding. The subpœna was issued under the provisions of section 900 (i) of the revenue act of 1924.

44 The commissioner answered the subpœna, or order of the board, in part, as follows: "I regret that it is necessary to inform you that the proper discharge of the duties of my office will not, in my opinion, admit the furnishing of the information called

for in said interrogatories. The reasons prompting this decision are as follows: 1, The information called for in said interrogatories is communicated to me as Commissioner of Internal Revenue in the strictest confidence and is privileged; 2, answer to the interrogatories will divulge information and data from the records in my office, the publication of which is prohibited by the provisions of section 3167 of the Revised Statutes. * * * Congress further emphasized the safeguard that should be thrown around inspection of tax returns by its enactment of section 257 (a) of the revenue act of 1924, which provides that the returns upon which the tax has been determined by me shall constitute public records, but that they shall be open to inspection only upon order of the President under rules and regulations prescribed by the Secretary and approved by the President. Certain definite exceptions are made by that section—for instance, the Committee of Ways and Means of the House of Representatives, Committee on Finance of the Senate, and certain others that are specifically mentioned."

In short the commissioner challenges the authority of the board to review his finding on the ground: 1, That the assessment of a tax, or refusal to do so, under the special-assessment provisions of the revenue law, involves the exercise of discretion vested in him by law which is not reviewable; and 2, that such a review would result in the disclosure to the public of records in his office, in violation of section 3167, Revised Statutes, as follows: "If any collector or deputy collector, or any inspector, or other officer acting under the authority of any revenue law of the United States, divulges to any party, or makes known in any other manner than may be provided by law, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to a fine, etc."

45 Congress did not intend by this statute to close the door to judicial inspection of tax records in the custody of the commissioner. Indeed, the statute itself provides for exceptions when it is otherwise "provided by law." Section 257 (a) of the revenue act furnishes a notable exception: "Returns upon which the tax has been determined by the commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President."

Considering section 3167 of the Revised Statutes, appearing in the revenue act of 1918, the commissioner, with the approval of the Secretary of the Treasury, on January 12, 1920, in Treasury Decision 2962, said: "There are numerous provisions in the statutes constituting the doing or failure to do certain things, offenses against the United States, and providing for collecting unpaid taxes in courts and for bringing suits to recover taxes and penalties wrongfully collected. These provisions would be of no avail were it held that the returns themselves, or certified copies thereof provided for

in section 822, Revised Statutes, could not be used by the Gover ment as evidence in such litigation or in preparation for sam Manifestly Congress did not, when it enacted section 3167, Revis Statutes, intend to defeat prosecutions and suits in court for which has specifically provided.

Income returns filed with the department as public records of th department and public records in the Treasury Department are right available as evidence in litigation in court unless there is son statute making it unlawful to use them as such. * * * As, ther fore, the use of income returns or copies thereof in connection wit litigation in court, where the United States Government is interest in the result, is provided by law, such returns or copies may b furnished for use without a violation of the provisions of sectio 3167, Revised Statutes, as amended."

46 Thus it appears that the commissioner himself, throug the Secretary of the Treasury, has established a department policy respecting the furnishing of records and data in aid o judicial proceedings in the courts, which includes, by the most rea sonable interpretation, the present case. It is difficult to conceive o any judicial proceeding more intimately dependent upon the evi dence, records, and data, on which the findings of the commissione in these tax cases is based, then the proceedings reviewing thos decisions on appeal by the Board of Tax Appeals.

This brings us to the consideration of the authority of the com missioner and an analysis of his jurisdiction in the premises. Th procedure to determine the deficiency in the present case, grow ing out of appellee's income tax for the years 1918, 1919, and 192 is found in Title II of the revenue act of 1924. Section 274 of th act provides: "(a) If in the case of any taxpayer, the commissione determines that there is a deficiency in respect of the tax imposed b this title, the taxpayer, except as provided in subdivision (d), shal be notified of such deficiency by registered mail, but such deficienc shall be assessed only as hereinafter provided. Within 60 day after such notice is mailed the taxpayer may file an appeal wit the Board of Tax Appeals established by section 900; (*b*) If th board determines that there is a deficiency, the amount so determine shall be assessed and shall be paid upon notice and demand fro the collector. No part of the amount determined as a deficienc by the commissioner but disallowed as such by the board shall b assessed."

The term deficiency is defined in section 273 of the act as follows "The amount by which the tax imposed by this title exceeds th amount shown as the tax by the taxpayer upon his return; but th amount so shown on the return shall first be increased by th amounts previously assessed (or collected without assessment) as deficiency, and decreased by the amounts previously abated, credited refunded, or otherwise repaid in respect of such tax." Fro

47 this it will be observed that a deficiency tax is merely the dif ference between the amount of tax imposed and the amou returned and paid by the taxpayer.

Turning to the jurisdiction of the board, section 900 of the revenue act, among other things, provides: "(e) The board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312. (i) For the efficient administration of the functions vested in the board or any division thereof, any member of the board may administer oaths, examine witnesses, and require, by subpœna ordered by the board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence from any place in the United States at any designated place of hearing; (2) the taking of a deposition before any designated individual competent to administer oaths under this act; and (3) the answer in writing under oath to any question of fact submitted. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any witnesses summoned or whose deposition is taken under this subdivision shall be paid the same fees and mileage as are paid witnesses in the courts of the United States."

It is clear, we think, from the foregoing provisions of the act that the board is vested with full reviewing jurisdiction over the findings of the commissioner in cases where a deficiency arises from a determination under the special assessment provisions of the act. The appellate power includes the authority not only to review but to investigate de novo the matters in controversy between the Government and the taxpayer. To this end the board may affirm, set aside, or modify, in such manner and to such extent as it may be advised, the findings of the commissioner.

48 Nor is the broad jurisdiction thus conferred upon the board limited or controlled by any discretionary power vested in the commissioner, or statutory inhibitions as to secrecy. Without stopping to analyze sections 327 and 328 of the revenue acts of 1918 and 1921, we find no duties there imposed upon the commissioner which rise to the dignity of unreviewable discretion. The mandatory and alternative methods there employed for reaching a lawful decision, while calling for the exercise of discretion, are merely the means pointed out for reaching a judicial decision subject to review on appeal, all of which, when appeal is taken, pass to the board, to be in turn disposed of by it according to its best judgment and discretion.

The board is an independent agency of the executive branch of the Government, vested with limited judicial powers to which the taxpayer may appeal before payment of an additional assessment of income, excess-profits, or war-profits taxes. This tribunal, unless clearly restricted by express statutory limitations, will be presumed to possess the power to call to its aid every agency essential to the full and complete investigation of the issues committed to its jurisdiction. Sustaining, as we must, the power of Congress to call this

board into existence and to vest it with the broad jurisdiction conferred by the revenue act, it would be a travesty to hold that the evidence upon which that jurisdiction may be intelligently exercised can be withheld by the subordinate officer of the Government, where decisions the board is specially vested with power to review. The statutes imposing secrecy upon the commissioner are not intended to impede the wheels of justice, or to in any manner interfere with the right accorded the taxpayer to avail himself, to the fullest extent, of the protection afforded h[illegible]n by appeal to the board. The right of appeal, and the authority of the board to subpœna witnesses and enforce the production of records and other data, is in the nature of special legislation and to that extent limits the operation of the general secrecy acts.

49 We are not impressed by the glowing picture drawn in the brief of the solicitor, in behalf of the commissioner, of the possibility of unlimited abuse of this power by the board. It is asserted that there is no limitation to the power of the board to call upon the commissioner for the records of all "the thousands of taxpayers that were available to the Commissioner of Internal Revenue when he made his determination." It must be assumed that the board will not abuse its power; that it will call only for such specific documents and data as will throw light on the case in hand; and only for the records of such corporations or persons as were used by the commissioner for comparative purposes. The power, however, to call for data and records in the possession of the commissioner is vested wholly in the discretion and judgment of the board—the commissioner has no option in the matter. The subpœna in this case quiets this alarm, since the twelve companies are specifically named from whose returns certain specified data is requested. The data is described in the petition for the subpœna as follows: "The 'data sheet' referred to in the following interrogatories means the comparative statistics data sheet, Treasury Department, Internal Revenue Bureau, Form 7365 of August, 1921, ordinarily used in compiling comparative data for the purpose of determining excess-profits tax in special cases under the provisions of section 328 of the revenue act of 1918."

This is sufficiently specific to limit the data called for to the particular records relevant to the case under consideration. The right of appeal here afforded has special reference to the protection of the taxpayer from possible arbitrary, unjust, or mistaken action by the officials of the Revenue Department. To sustain the contention of the commissioner would amount to the practical nullification of the act in so far as it provides for the right of appeal. It would impute to Congress the inconsistency of providing for this im-

50 portant board, imposing upon it broad jurisdiction, and then tying its hands and rendering it impotent. This was not the intention of Congress, and it is not the intention of the law.

The decree is affirmed with costs.

51 In Court of Appeals of District of Columbia

DAVID H. BLAIR, COMMISSIONER OF Internal Revenue, appellant
vs.
OESTERLEIN MACHINE COMPANY, A corporation
No. 4420. January Term, 1927

Decree

Jan. 3, 1927

An appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL.

JANUARY 3, 1927.

52 In Court of Appeals of District of Columbia

Memorandum re motion to stay mandate

January 20th, 1927

Motion to stay mandate pending; application for certiorari filed.

53 In Court of Appeals of District of Columbia

[Title omitted.]

Order granting motion to stay mandate

Jan. 22, 1927

On consideration of the motion to stay the mandate in the above-entitled cause pending application for certiorari to the Supreme Court of the United States, it is ordered by the court that said motion be, and the same is hereby, granted.

54 [Clerk's certificate to foregoing transcript omitted in printing.]

In Supreme Court of the United States

Order allowing certiorari

Filed May 2, 1927

The petition herein for a writ of certiorari to the Court of Appe of the District of Columbia is granted. And it is further order that the duly certified copy of the transcript of the proceedings bel which accompanied the petition shall be treated as though filed response to such writ.

MAY 2, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. ——

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

OESTERLEIN MACHINE COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of David H. Blair, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the decree of the Court of Appeals of the District of Columbia entered in the above-entitled cause on January 3, 1927 (R. 46), affirming the decree of the Supreme Court of the District of Columbia (R. 39).

STATEMENT

The question presented here is whether the Board of Tax Appeals, and, consequently, the courts, have jurisdiction to review the determinations made by the Commissioner of Internal Revenue, in the exer-

cise of the judgment and discretion committed to him by Congress under the provisions of Sections 327 and 328 of the Revenue Act of 1918, which authorized the Commissioner, where abnormal conditions were found by him to exist which made the ordinary formula for computing war-profits and excess-profits taxes work exceptional hardship and produce inequitable results to the taxpayer, to make what has been called a special assessment, so as to approximate the rate of taxation to that paid by other representative corporations in the same line of business.

The provisions of Sections 327 and 328 are set forth in the supporting brief.

This statute provided that where the Commissioner was unable to determine invested capital or was unable satisfactorily to determine the respective values of mixed tangible and intangible property paid in for stock, or where the Commissioner—

> finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328—

then, instead of the tax being computed according to the regular formula prescribed in the statute, the taxpayer's tax should be—

> the amount which bears the same ratio to the net income of the taxpayer * * * as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income * * * for such year.

The question arises in this case in the way hereinafter described.

The tax returned by the taxpayer and paid by it according to its return for the year 1918 was $54,-351.29. (R. 2.) It returned and paid for the year 1919 $20,453.66. (R. 2.) After the usual proceedings in the Bureau of Internal Revenue, the Commissioner, under date of June 28, 1924, finally determined that the correct amount of the tax for 1918 was $45,055.12, and for 1919 $30,693.75. (R. 9, 4.) The result was that the Commissioner determined that there had been an overassessment for 1918 in the sum of $9,296.17 (R. 10), and that there was a deficiency in the tax paid, and therefore an additional assessment required for the year 1919 in the sum of $10,240.09. In determining the amount of the overassessment for 1918 the Commissioner determined, in accordance with the provisions of Section 327, that the taxpayer was entitled to relief under that section and, in so doing, determined, by comparison with representative corporations as provided in Section 328, what the rate of the tax should be. In passing on the amount of the tax for the year 1919 and in determining the deficiency and the additional assessment required for that

year, the Commissioner refused to apply the provisions of Section 328, and, in the exercise of the discretion vested in him under Section 327, determined that no conditions existed which entitled the taxpayer for the year 1919 to the special relief provided in these sections. The Commissioner also considered the tax for the year 1920 and determined that an additional tax of $182.45 should be imposed for that year (R. 36), but no question is raised respecting that year. Deducting the overassessment for 1918 thus determined from the deficiency determined for 1919 and 1920, the Commissioner determined that there was a net deficiency for the three years of $1,126.37. The taxpayer thereupon took an appeal to the Board of Tax Appeals under the provisions of the Revenue Act of 1924 (R. 11), on the grounds that while the Commissioner had granted the request of the taxpayer for special assessment for the year 1918 under the provisions of Sections 327 and 328, he had not applied the proper percentage based on the taxes paid by other representative corporations, and that, with respect to 1919, the Commissioner had erred in refusing to grant relief under the special assessment provisions.

With respect to 1918, the appeal was based on the theory that although the Act of 1924 allowed an appeal by the taxpayer to the Board of Tax Appeals only in cases where a deficiency was determined to exist by the Commissioner, and his determination of the amount of the overassessment for 1918 could not be reviewed by the Board consider-

ing that year alone, nevertheless since there was a net deficiency determined to exist for the three years considered by the Commissioner, the Board, on that account, had power to review the determination of the Commissioner as to the amount of the overassessment for 1918, which entered into the computation.

When the case reached the Board of Tax Appeals the Commissioner interposed an answer (R. 14), denying that error was committed by him in fixing the rate for computing the profits tax for the year 1918 under the provisions of Section 328, and denying that error was committed in denying to the taxpayer special assessment for the year 1919 under the provisions of Section 328, and objecting to review by the Board of the amount of the overassessment for the year 1918 on the ground that there was no deficiency determined by the Commissioner for that year and the Board had power only to review his determination as to deficiencies.

On March 17, 1925, pending the appeal before the Board of Tax Appeals, counsel for the taxpayer filed with the Board an application for subpœna directed to the Commissioner of Internal Revenue requiring him to answer, in writing under oath, certain questions of fact relating to the taxes of certain other taxpayers who were engaged in a business similar to that of this respondent in the years 1918 and 1919. (R. 5; Exhibit F, R. 26.) This subpœna called for a complete disclosure to

this taxpayer and the presentation before the Board of Tax Appeals not only of the returns but of annexed information on file in the department respecting the income and profits taxes for the years 1918 and 1919 of a number of corporations which were engaged in those years in the business of manufacturing and selling machine tools, which was the business of this respondent. (R. 27–29.) The subpœna was issued by the Board of Tax Appeals directed to the Commissioner of Internal Revenue accordingly. (R. 29.) The Commissioner thereupon filed with the Board an answer to this subpœna stating that in his opinion the proper discharge of his office would not admit the furnishing of the information called for (R. 31–33), and that the Board had no jurisdiction to require the publication in this way of confidential information respecting the taxes and business and returns of other taxpayers. Thereafter the respondent herein filed in the Supreme Court of the District of Columbia a petition requesting that the Commissioner be ordered and directed to obey the subpœna and produce and disclose the information called for. (R. 1–8.) A rule to show cause was issued (R. 35), and the Commissioner interposed an answer (R. 36) in which he contended that he is prohibited by Section 3167 of the Revised Statutes of the United States as reenacted in Section 1317 of the Revenue Act of 1918, Section 1311 of the Revenue Act of 1921, and Section 1018 of the Revenue Act of 1924 from making public or disclosing the information called

for. He denied that it was or is the duty of the Board of Tax Appeals, in order to enable it to fully perform in this case the functions for which it was created, to examine or disclose or make public the income-tax returns of other corporations. (R. 37.) The Commissioner also filed a motion to dismiss the petition, in which he asserted that the Board of Tax Appeals has no jurisdiction to review the action of the Commissioner in fixing a rate of taxation in compliance with the law relating to special assessments or in refusing to grant a special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. (R. 38–39.) Thereupon, on June 29, 1925, the Supreme Court of the District, denied the Commissioner's motion to dismiss, and entered a judgment directing him to obey the subpœna theretofore issued by the Board. (R. 39.) The Commissioner took an appeal to the Court of Appeals of the District of Columbia, assigning as error that the Supreme Court of the District had erred in overruling his motion to dismiss and in not holding that the Board of Tax Appeals is without jurisdiction to review the determination of the Commissioner under the provisions of Sections 327 and 328 of the Revenue Act of 1918. (R. 40.)

The Court of Appeals entered a judgment on January 3, 1927, affirming the judgment of the Supreme Court of the District, and it is to review this judgment of the Court of Appeals that the writ of certiorari is now sought for.

40826—27——2

SPECIFICATION OF ERRORS

The Court of Appeals of the District erred—

I. In affirming the judgment of the Supreme Court of the District.

II. In holding that the Board of Tax Appeals had jurisdiction to review the determination of the Commissioner of the amount of the overassessment for 1918, because there was a net deficiency determined for that year and others.

III. In holding that the Board of Tax Appeals had jurisdiction to review the determination of the Commissioner, made in applying the provisions of Sections 327 and 328 of the Revenue Act of 1918, as to the rate of the tax for the year 1918.

IV. In holding that the Board of Tax Appeals had jurisdiction to review the decision of the Commissioner that, for the year 1919, the taxpayer was not entitled to special assessment under Sections 327 and 328 of the Revenue Act of 1918.

V. In holding that all of the information called for by the subpœna in question, including the returns and detailed information respecting the affairs of other corporations engaged in the same line of business for the years 1918 and 1919, must be disclosed to this respondent and become a public record before the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

I. The provisions of the Act of 1918, granting special relief by way of special assessment where the regular formulæ for determining taxes would

work exceptional hardship, are relief provisions, and the terms of the statute justify the contention that there was reposed in the Commissioner a discretion to determine whether such provisions should be applied, and, if applied, what the rate of taxation should be, by comparison with other representative corporations. The relief provided for was not a matter of right, but a matter of grace, and the nature of the subject matter dealt with and the terms of the statute justify the contention that the determination by the Commissioner was final.

II. If the determination of the Commissioner is subject to review by the Board of Tax Appeals, as held by the courts below, it is likewise subject to review by the courts. Many thousands of these special assessment cases have been disposed of by the Bureau of Internal Revenue and closed upon the books on the supposition that the Commissioner's findings and determination dispose of the cases. The decision below raises a serious administrative problem, in that it opens thousands of these cases to applications for refund and to suits in the courts to recover taxes alleged to be illegally assessed, since if the Board of Tax Appeals has power to review the Commissioner's decision the courts have the same power.

III. If the decision below is allowed to stand and the determination of the Commissioner in these special assessment cases is held to be reviewable by the Board of Tax Appeals, with the consequent re-

sult that it is also reviewable by the courts, the doors are opened to applications and suits for refunds which the Treasury Department estimates may exceed $100,000,000.

IV. If the decisions below are not reversed, it will result that any taxpayer who is in a position to claim special assessment is entitled to examine and inspect the returns of all other corporations engaged in a similar business and to examine and inspect all of the information on file in the department relating to the returns of competitors, and such information, when presented to the Board of Tax Appeals, becomes a public record and the result will be to give publicity, so carefully guarded against by other provisions of the Act, to the returns of many taxpayers.

V. If the Board of Tax Appeals has power to review the determination of the Commissioner, the courts have similar power, and will be called upon, in suits to recover taxes alleged to have been illegally collected, to determine, or submit to juries for determination, a mass of information and material respecting corporations engaged in a line of business similar to the taxpayer, and will be entitled to and required to subpœna other taxpayers engaged in a similar line of business to produce evidence respecting their business and taxes for use as a basis to apply the provisions of the special assessment sections. The nature of the subject matter is such that it is wholly impracticable for courts and juries to endeavor to substitute their judg-

ments for that of the Commissioner and attempt to apply the special assessment sections.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

MARCH, 1927.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

No written opinion was filed by the Supreme Court of the District. The opinion of the Court of Appeals has not been reported, but will be found at page 42 of the record.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered January 3, 1927. (R. 46.) Jurisdiction to issue the writ is found in the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether the provisions of Sections 327 and 328 of the Revenue Act of 1918, providing for special assessment and a special method of determining the war profits and excess profits tax rate of certain taxpayers where the application of the ordinary statutory formula

works hardship or is impracticable, contemplate that the decision of the Commissioner of Internal Revenue as to whether the special assessment provision should be applied, and, if applied, what the rate should be, shall be final or subject to review by the Board of Tax Appeals and by the courts.

THE STATUTES

Sections 327 and 328, Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1093).

Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax com-

puted without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

Sec. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily

determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

> (c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

The provisions of the Revenue Act of 1924, relating to determination of deficiencies by the Commissioner of Internal Revenue and authorizing appeals to the Board of Tax Appeals to review the decision of the Commissioner as to deficiencies, are set forth in Appendix A.

STATEMENT

The facts are sufficiently stated in the petition for certiorari.

ARGUMENT

The material set forth in the petition, together with the applicable statutes, sufficiently discloses that there is substantial ground for the contention that Sections 327 and 328 of the Revenue Act of 1918, by reason of the expressions used and the nature of the subject matter dealt with, contemplated that the granting of relief to taxpayers in

the form of special assessment under these sections was a matter entrusted to the discretion of the Commissioner, the only check on the exercise of that discretion being the requirement that he should make his determination a matter of record and should report to Congress the cases in which he had applied the special assessment provision. Looking at Sections 327 and 328, the conclusion is almost irresistible that it was the intention to entrust the decision to the Commissioner and make his decisions final. Section 327 (a) provides that the tax shall be determined under Section 328 "where the Commissioner is unable to determine the invested capital." Subdivision (c) provides that Section 328 shall be applied if "the Commissioner is unable satisfactorily to determine the respective values of the several classes of property," etc. Subdivision (d) provides that the special assessment allowed in Section 328 may be applied where, upon application by the corporation, "the Commissioner finds and so declares of record" that the tax, if determined without the benefit of this section, would work exceptional hardship, evidenced by gross disproportion between the tax computed without the benefit of the section and the tax computed by reference to the representative corporations specified in Section 328. These provisions, fairly construed, indicate that it is the Commissioner who must be unable satisfactorily to himself to determine these things, and it must be the Commissioner who finds and so declares of record that hardship would

result, and it must be the Commissioner who is unable to determine invested capital, as provided in Section 326, before special assessment shall be granted.

The decision below is to the effect that the special assessment provisions in Section 328 may be applied if the Board of Tax Appeals or a court or jury is unable to determine the invested capital or if the Board or the courts are "unable satisfactorily to determine" the respective values of classes of property paid in for stock, or if the Board or a court or jury "finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions" impose hardship, and that it is open to the Board of Tax Appeals and, consequently, to a court and a jury to examine the mass of confidential material available in the Bureau of Internal Revenue respecting the business and taxes of other taxpayers engaged in the same line of business, and to compel the production of original evidence from such taxpayers in order to enable the Board or court or jury, as the case may be, to make the comparison with respresentative corporations and determine through such comparison an equitable rate of taxation. It is hard to believe that Congress intended any such result.

The respondent claims, and the courts below held, that the general provisions of the statute giving the Board of Tax Appeals jurisdiction to review on

appeal determinations by the Commissioner that deficiencies exist in the amount of the tax paid for any year by a taxpayer give the Board power to review the determination of the Commissioner, which may enter into the determination of the deficiency, that the taxpayer is not entitled to special assessment, or, if he is, the determination as to what the rate should be by comparison with representatives. This result does not follow from the general provisions giving jurisdiction to the Board to review determination of deficiencies. The provisions respecting jurisdiction of the Board and the provisions of Sections 327 and 328 should be construed together, and it should be held that the general power to review the determination of the Commissioner that a deficiency exists is subject to the qualification in special assessment cases that, in so far as the determination of the Commissioner under the special assessment provisions enters into the determination of the deficiency, his findings must be accepted by the Board, with the result, in cases like the present, that, where the review asked of the Board respecting a determination of deficiency involves *only* a review of the Commissioner's findings under the special assessment provisions, the Board is without jurisdiction to act. To put it in another way: On an appeal, taken to review a determination as to a deficiency, whenever it appears to the Board, as it did appear in this case, that no question is raised except the propriety of the Commissioner's findings under the special assessment provisions,

the Board should cease to proceed further and should dismiss the appeal or affirm the finding of the Commissioner and not attempt to compel the production of evidence to enable it to review his finding. To support this construction of the statute, it is proper to emphasize the fact that the construction adopted by the court below will result in opening to public inspection, at the instance of any taxpayer engaged in a particular line of business, the reports and confidential information on file with the Bureau of Internal Revenue of all other taxpayers engaged in a similar line of business, and will result further—since the courts may review the Commissioner's finding if the Board may—in the compulsory production before judicial tribunals and juries of original evidence from other taxpayers engaged in similar lines of business, in order to enable the court to determine, by comparison with representative corporations, the rate of taxation that should equitably be applied. This is so, because in no case in which the Board may review the findings of the Commissioner, or a court may review those findings, are these tribunals limited to considering the evidence available in the files of the Bureau of Internal Revenue. No construction of the statute should be adopted which results in publicity of tax returns and confidential information which have been so carefully guarded by the other provisions of the Revenue Acts.

To step aside for a moment from the main questions in the case, it will be noted that this case raises

the question whether, under the Revenue Act of 1924, the Board of Tax Appeals, having jurisdiction on appeal only to review determinations of deficiencies, may review a determination of an overassessment for any year merely because the Commissioner has considered several years together and by offsetting the overassessment of one year against the additional assessment for another determined that for a period of years a net deficiency exists. If, as must be admitted, the Board had no power under the 1924 Act to review a determination by the Commissioner of an overassessment for a single year taken by itself, it is hard to believe that Congress intended that it should have that power by indirection where several years are considered together and a net deficiency for the series of years is determined by the Commissioner.

The Board of Tax Appeals held that under the Act of 1924 it had such power. (*Appeal of E. J. Barry,* 1 B. T. A. 156.) It has held that under the Revenue Act of 1926 it has no such jurisdiction. (*Appeal of Cornelius Cotton Mills,* 4 B. T. A. 255.) This latter decision is based on the provisions of Section 274(g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 56, which reads as follows:

> The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to

> determine whether or not the tax for any other taxable year has been overpaid or underpaid.

If the Board had no jurisdiction under the provisions of the Act of 1924 to review indirectly the determination of overassessment for 1918, then the writ of subpœna which was issued was unauthorized in that it called for information for that year respecting other representative corporations. If the Board had jurisdiction to consider a determination of overassessment because a net deficiency was determined for a series of years, then we have presented two questions raised by the fact that the subpœna called for information respecting 1918 and 1919, viz, whether the determination of the Commissioner as to the rate of taxation under Section 328 may be reviewed in a case where he determines to apply the special assessment provisions, and whether the determination of the Commissioner that the taxpayer is not entitled to special assessment may be reviewed.

That the case is an important one and presents questions justifying the issuance of a writ of certiorari seems to be made clear by the above discussion as to the merits and by the disclosures in the petition for certiorari under the head of "Reasons for Issuing the Writ," which show that by this decision the doors have been opened to applications and suits for refunds in vast sums, and to the opening of thousands of cases which have been consid-

ered closed, and to publicity of confidential information respecting taxpayers.

In Appendix B is an opinion just rendered by the District Court of the United States for the Northern District of Ohio in *The Feilbach Company* v. *Niles, Collector,* dealing with Section 210 of the Revenue Act of 1917, which granted relief similar to that provided in Sections 327 and 328 of the Revenue Act of 1918. The decision of the District Judge indicates that, in his opinion, the determination of the Commissioner in such cases is only reviewable on a showing that he acted arbitrarily and without justification.

Of course, if the Board of Tax Appeals or a court may inquire whether the Commissioner's decision is arbitrary or without any evidence to support it, the Board or court, as the case may be, has a right to have produced the material in the Bureau on which the Commissioner acted.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.
A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.
CHARLES T. HENDLER,
Special Attorney,
Bureau of Internal Revenue.

MARCH, 1927.

Appendix A

(Revenue Act of 1924, c. 234, 43 Stat. 253)

Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title [relating to income and profits taxes], the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

* * * * *

Sec. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the

claim immediately to the Commissioner who shall by registered mail notify the taxpayer of his decision on the claim. The taxpayer may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. * * *

* * * * *

Sec. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

* * * * *

Sec. 308. (a) If the Commissioner determines that there is a deficiency in respect of the tax imposed by Part I of this title [relating to estate taxes], the executor, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the executor may file an appeal with the Board of Tax Appeals established by section 900.

* * * * *

Sec. 312. (a) If a deficiency has been assessed under subdivision (d) of section 308, the executor, within 30 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the claim immediately to the Commissioner who shall by registered mail notify the executor of his decision on the claim. The executor may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. * * *

* * * * *

Sec. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). * * *

* * * * *

(e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312. * * *

* * * * *

(h) * * * Hearings before the Board and its divisions shall be open to the public. * * * All reports of the Board and its divisions and all evidence received by the Board and its divisions (including, in cases where the oral testimony is reduced to writing, the transcript thereof) shall be public records open to the inspection of the public. * * *

(i) For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board may administer oaths, examine witnesses, and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, (2) the taking of a deposition before any designated individual competent to administer oaths under this Act, and (3) the answer in writing under oath to any question of fact submitted. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent. * * *

* * * * *

(k) * * * The Board shall be an independent agency in the executive branch of the Government.

Appendix B

In the District Court of the United States for the Northern District of Ohio, Western Division. The Feilbach Company, plaintiff, against Frank B. Niles, Collector of Internal Revenue, defendant. At law, 3185

MEMORANDUM OPINION

Killits, J.:

Section 210 of the Revenue Act of 1917 must be considered to be an administrative provision for the guidance of the Commissioner of Internal Revenue in the determination of invested capital, upon which computation of excess-profits tax may be made in those somewhat unusual occasions when the very definitive section (207) can not be applied. It seems obvious that the circumstances which would clothe the Commissioner with the discretion to apply Section 210 would occur somewhat rarely in the administration of the law, because Congress was somewhat meticulous in its definition of what invested capital should be considered to be, and how it should be ascertained, in the writing of Section 207, whose terms manifestly would meet the conditions in a vast majority of cases.

The section under consideration, 210, is one whose provisions are to be invoked primarily and most generally by the Commissioner alone. Very, very rarely, and under quite extraordinary circumstances, it would seem, can the section be resorted to as a mode of relief by the taxpayer. The statute limits resort to it to only when the Commissioner finds that he can not "satisfactorily" ascertain invested capital for the computation of excess-profits

tax under Section 207. It would follow that, if the Commissioner or his agents actually computes capital under 207, his action should be presumed to exclude any application of Section 210, the burden then being upon a claimant to relief under the provisions of the latter section to show that the Commissioner acted arbitrarily and without justification. It would be a rare case indeed wherein a court would be justified in concluding that the Commissioner could not "satisfactorily" apply the provisions of Section 207 to a determination of the question, when, in fact, the Commissioner satisfied himself that he could so do.

Reading the allegations of the petition in light of this consideration of the statutes in question and the Commissioner's action thereon, we find no reason for the interposition of the court in the form of a review of his judgment.

It is evident that Congress, in framing Section 207, intended not only to prevent vague and difficult determinations through the examination of circumstances hard to establish, but to set up standards of determination so rigid and so easily applicable that only a very extraordinary condition would justify a determination that the section was not workable. *Cartier* v. *Doyle,* 277 Fed. 150; *La Belle Iron Works* v. *United States,* 256 U. S. 377. Applying the authorities just cited and going to the four reasons set up as indicating that the Secretary of the Treasury in the instant case could not satisfactorily determine invested capital, we are unable to find that such a conclusion is a proper deduction. Section 207 seems to this court to read to the exclusion of any one of these four alleged facts; nor

do the four of them cumulated tend to take the present situation out of the operation of the section in question, and, therefore, afford the plaintiff relief. On the contrary, as we read Section 207, it negatives the ability of the taxpayer to resort to any of these reasons to exonerate it from the provisions of that section.

The demurrer, therefore, to the petition is sustained.

——— ———, *Judge.*

MARCH 25, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

OESTERLEIN MACHINE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court below is reported in 17 F. (2d) 663, and is printed at page 44 of the Record.

JURISDICTION

The judgment of the Court of Appeals for review was entered January 3, 1927. (R. 49.) The petition for certiorari was filed April 2, 1927, and granted pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented are (1) whether the provision of the Revenue Act of 1924 giving the Board

of Tax Appeals jurisdiction to review the action of the Commissioner of Internal Revenue in determining that there is a deficiency in the amount of taxes paid by a taxpayer gives the Board jurisdiction to review the Commissioner's determination of the tax for a particular tax year as to which he decides that there was not a deficiency but an overassessment, merely because in considering several tax years together he determined that there was a net deficiency over the whole period, and (2) whether the action of the Commissioner in deciding that a taxpayer is not entitled to relief under the special assessment provisions of the Revenue Act of 1918, or in deciding what relief should be granted in applying the special assessment provisions, may be reviewed by the Board of Tax Appeals and by the courts.

STATEMENT

The Oesterlein Machine Company returned and paid Federal income and excess-profits taxes for the years 1918 and 1919 of $54,351.29 and $20,453.66, respectively. (R. 1.) In the final determination of these taxes the Commissioner of Internal Revenue considered at the same time the returns of this corporation for 1918, 1919, and 1920, and reduced the 1918 tax by $9,296.17 and increased the 1919 tax by $10,240.09. (R. 4, 10, 15.) The net result (which included an item of $182.45 for 1920, which is not questioned) for the three taxable years 1918, 1919, and 1920 was a balance of $1,126.37 against the company.

In determining the 1918 tax the Commissioner granted the taxpayer's request and made a special assessment under Sections 327 and 328 of the 1918 Act. For 1919 the Commissioner decided no ground existed for special assessment and determined the tax in the ordinary way. The respondent is dissatisfied with the result arrived at for 1918 in applying the special assessment provisions, and also with the refusal of the Commissioner to grant relief by special assessment for 1919, and is seeking to review the Commissioner's action by appeal to the Board of Tax Appeals, and the power of the Board to review the Commissioner's action was raised by him through resistance to a subpœna issued by the Board, requiring the production before the Board of the returns of other taxpayers in the same line of business, to enable the Board to review the Commissioner's action. The facts more in detail are set forth below.

In 1920 the Oesterlein Company was advised by the Commissioner that because the invested capital to be applied to its 1917 tax could not be satisfactorily determined, its tax for 1917 had been fixed by comparison with that of others engaged in similar business, under the Revenue Act of October 3, 1917, c. 63, Section 210 (40 Stat. 300, 307) (R. 2). At the time it received this information, its returns for 1918 and 1919, which had already been filed, reported an invested capital and a tax to be imposed. (R. 2.) Thereupon the Company submitted amended returns for 1918 and 1919, which omitted

the items of invested capital and tax. (R. 2.) It asked that its taxes for those years be fixed as its 1917 tax had been; that is, under the provisions of Sections 327 and 328 of the Revenue Act of 1918 .(R. 2–3.)

The Commissioner revised the Company's tax for 1918 and 1919 and determined a liability of $68,335.92 and $26,998.84, respectively (R. 1, 3), making this revision, however, without reference to the amended returns, and by application of the general, instead of the special, provisions of the Revenue Act of 1918; that is to say, by using an invested capital determined under Section 326 of that Act and by computing the tax according to the general method prescribed in Section 301 of the Act. (R. 3.)

The Company again requested a determination of its tax for 1918 and 1919 under Sections 327 and 328. (R. 3, 4.) The Commissioner yielded as to 1918 and applied for that year a rate established under Section 328, which reduced the tax for that year to $51,722.11 (R. 1, 4, 10). He declined, however, to fix the tax for 1919 under Section 328 and increased it about $4,000 (R. 4, 3).

The Company again protested, and the matter was in March, 1924, referred to, heard and considered by an agency in the Bureau known as the Committee on Appeals and Reviews. (R. 4, 5, 9, 10, 13.) That Committee, concurring in part with

the Commissioner, applied to the Company's 1918 tax a rate established under Section 328 (R. 5), and further recommended that the tax for 1918 be fixed at about $9,000 less than the Company had originally reported. The Committee was of the opinion that a tax of $45,055.12 for 1918, the amount finally imposed, was equitable to the Government and the taxpayer. (R. 4, 10.)

As to the 1919 tax, the Committee stated that it had "investigated the statistics of concerns which were suggested at the oral hearing and the statistics of additional concerns, and is of the opinion that assessment of the profits tax for the year 1919, under the provisions of Section 328 of the 1918 Revenue Act was properly denied." (R. 4.)

The Company thereafter, on August 22, 1924, appealed to the Board of Tax Appeals. It alleged (1) that although the Commissioner had determined its tax for 1918 under Section 328, the standard which he had created was defective and produced a tax greater than it ought to pay (R. 5, 11–13), and (2) that the Commissioner ought to have determined the tax for 1919 under Section 328 (R. 5, 11–19), because (*a*) he had been unable to satisfactorily determine its invested capital for 1917, (*b*) the net income for 1919 was abnormal (R. 12–13), and (*c*) its profits tax for 1919 was greater than the ratio of average net income to average invested capital of a group of corporations alleged by it to be representative (R. 13–14).

To obtain evidence showing the alleged disparity between the tax imposed upon it and that of others in the same business, the Company applied to the Board for authority to take the deposition of a witness (R. 5) and for a subpœna requiring the Commissioner to answer interrogatories and submit exhaustively itemized information from tax returns filed by twelve corporations named in the subpœna. (R. 5–6, 30–33.) The Commissioner denied the jurisdiction of the Board to authorize the deposition or to require a response to the subpœna because (1) in Sections 327 and 328 Congress delegated to the Commissioner exclusive nonreviewable power to determine whether relief should be granted to a taxpayer by applying the special assessment provisions and to fix tax rates in making special assessments (R. 16), and (2) the information submitted by other taxpayers had been received in confidence, and its disclosure was prohibited by law. (R. 34.)

The Board of Tax Appeals, the Supreme Court of the District of Columbia, upon an application for enforcement of the subpœna, and the Court of Appeals have successively overruled these objections. (R. 17, 35, 36, 42, 44, 49.)

STATUTES INVOLVED

Section 301 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1088) provides for assessment of war-profits and excess-profits tax by the general method of assessment, and its pertinent provisions are as follows:

SEC. 301. (a) That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

FIRST BRACKET

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

SECOND BRACKET

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital;

THIRD BRACKET

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(b) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations taxable under subdivision (c) of this section) a tax equal to the sum of the following:

FIRST BRACKET

20 per centum of the amount of the net income in excess of the excess-profits credit

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(determined under section 312) and not in excess of 20 per centum of the invested capital;

SECOND BRACKET

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

* * * * *

Sections 311 and 312, providing the formulæ for fixing the credits above referred to, are as follows:

SEC. 311. (a) That the war-profits credit shall consist of the sum of:

(1) A specific exemption of $3,000; and

(2) An amount equal to the average net income of the corporation for the prewar period, plus or minus, as the case may be, 10 per centum of the difference between the average invested capital for the prewar period and the invested capital for the taxable year. If the tax is computed for a period of less than twelve months such amount shall be reduced to the same proportion thereof as the number of months in the period is of twelve months.

(b) If the corporation had no net income for the prewar period, or if the amount computed under paragraph (2) of subdivision (a) is less than 10 per centum of its invested capital for the taxable year, then the war-profits credit shall be the sum of:

(1) A specific exemption of $3,000; and

(2) An amount equal to 10 per centum of the invested capital for the taxable year.

(c) If the corporation was not in existence during the whole of at least one calendar year during the prewar period, then, except as provided in subdivision (d), the war-profits credit shall be the sum of:

(1) A specific exemption of $3,000; and

(2) An amount equal to the same percentage of the invested capital of the taxpayer for the taxable year as the average percentage of net income to invested capital, for the prewar period, of corporations engaged in a trade or business of the same general class as that conducted by the taxpayer; but such amount shall in no case be less than 10 per centum of the invested capital of the taxpayer for the taxable year. Such average percentage shall be determined by the Commissioner on the basis of data contained in returns made under Title II of the Revenue Act of 1917, and the average known as the median shall be used. If such average percentage has not been determined and published at least 30 days prior to the time when the return of the taxpayer is due, then for purposes of such return 10 per centum shall be used in lieu thereof; but such average percentage when determined shall be used for the purposes of section 250 in determining the correct amount of the tax.

(d) The war-profits credit shall be determined in the manner provided in subdivision (b), instead of in the manner provided in subdivision (c), in the case of any corporation which was not in existence during the whole of at least one calendar year during

the prewar period, if (1) a majority of its stock at any time during the taxable year is owned or controlled, directly or indirectly, by a corporation which was in existence during the whole of at least one calendar year during the prewar period, or if (2) 50 per centum or more of its gross income (as computed under section 233 for income tax purposes) consists of gains, profits, commissions, or other income, derived from a government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

(e) A foreign corporation shall not be entitled to a specific exemption of $3,000.

SEC. 312. That the excess-profits credit shall consist of a specific exemption of $3,000 plus an amount equal to 8 per centum of the invested capital for the taxable year.

A foreign corporation shall not be entitled to the specific exemption of $3,000.

Sections 327 and 328, which are called the special assessment provisions of the Revenue Act of 1918, are as follows:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and

the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328 (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the aver-

age tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

* * * * *

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of in-

vested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

The jurisdiction of the Board of Tax Appeals is stated in the Revenue Act of 1924, Section 900 (c. 234, 43 Stat. 253, 336, U. S. C., Title 26, sec. 1211), as follows:

> (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.
>
> * * * * *
>
> (e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312.

Section 280 of the 1924 Act (43 Stat. 301, U. S. C., Title 26, sec. 1064) provides:

> If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be as-

sesed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Section 274 (43 Stat. 297, U. S. C., Title 26, sec. 1048) reads as follows:

> (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

Deficiency is defined by the same Act, Section 273 (43 Stat. 296, U. S. C., Title 26, sec. 1047), as follows:

> As used in this title the term "deficiency" means—
>
> (1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts

previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SUMMARY OF ARGUMENT

I. The Board of Tax Appeals had no jurisdiction to review the Commissioner's decision as to the 1918 tax. It had jurisdiction under the Revenue Act of 1924 to review decisions of the Commissioner only where he determined that a deficiency existed and an additional tax was required to be paid. For the purpose of this provision each tax year must be separately considered. In this case the Commissioner considering the 1918 tax and 1919 tax at the same time determined that there had been an overassessment for 1918. The fact that he determined a deficiency for 1919, greater than the overassessment for 1918 and resulting in a net balance due the United States for the two years taken together, did not allow the Board to review his decision as to

1918. A right of appeal as to any tax year should not be given or taken away by the circumstance that the Commissioner does or does not consider a number of tax years at one time.

II. The result arrived at by the Commissioner in applying for the year 1918 the special assessment provisions of Sections 327 and 328, Revenue Act of 1918, and his decision that no ground existed for granting relief by special assessment for 1919 are not subject to review by the Board of Tax Appeals. The language of the statute shows that it was the intention of Congress to entrust the decision of these matters to the discretion of the Commissioner.

The very nature of the subject to be dealt with, the impracticability of having courts and juries attempt to apply these special-assessment provisions, the lack of uniformity which would follow, and the exposure to the public of the confidential returns of other taxpayers in the same line of business, which would result if the Commissioner's decision is reviewable, all support the conclusion that the granting of relief under these sections was intended to rest with the Commissioner alone.

ARGUMENT

I

THE BOARD OF TAX APPEALS HAD NO JURISDICTION TO REVIEW THE DETERMINATION OF THE 1918 TAX BECAUSE THE COMMISSIONER DID NOT DETERMINE THAT THERE WAS A DEFICIENCY FOR THAT TAXABLE YEAR

The jurisdiction of the Board of Tax Appeals to hear and determine appeals is conferred by the

provisions of Section 900 (e) of the Revenue Act of 1924. This section limits the jurisdiction of the Board to hear and determine appeals filed under Sections 274, 279, 308, and 312 of the Revenue Act of 1924.

In the case at bar we are concerned only with appeals filed under Section 274. This section provides that in the case of any taxpayer, if the Commissioner determines that there is a deficiency in the amount of tax which has been returned, the taxpayer shall be notified by registered mail and that within sixty days after such notice the taxpayer may file an appeal with the Board of Tax Appeals. The term "deficiency" referred to in that section is defined by Section 273 of the 1924 Act as (1) the amount by which the tax imposed exceeds the amount shown as tax by the taxpayer upon his return, or (2) if no amount is shown as the tax upon his return, or if no return is made, then the amount by which the tax exceeds the amounts previously assessed as a deficiency.

These two sections make clear that the existence of a deficiency is a condition precedent to the Board of Tax Appeals having jurisdiction to review the determination of a tax under Section 274.

The original tax return of the respondent for the taxable year 1918 showed an income and excess-profits tax of $54,351.29. (R. 1.) Later the respondent filed amended returns for the years 1918 and 1919 in which he omitted the items of invested

capital and the amount of the tax, and requested that the tax for both of these years be computed under the provisions of Sections 327 and 328 of the Revenue Act of 1918. (R. 2.) This request was granted for the year 1918 and the Commissioner computed the tax for that year to be $45,055.12. (R. 4.) The amount of the tax for 1918, therefore, as finally determined by special assessment, was actually $9,296.17 less than the tax shown on the original return. Accordingly, on the record here presented, the condition precedent to a review by the Board of Tax Appeals of the Commissioner's action respecting the 1918 tax by an appeal filed under the provisions of Section 274 (a) of the Revenue Act of 1924 does not in fact exist, and the Board has no jurisdiction.

It was argued below that although there was no deficiency for the year 1918 alone, nevertheless there was a so-called "net deficiency" for the years 1918, 1919, and 1920, considered together, which gave the Board jurisdiction to review the Commissioner's decisions for all three years. This contention is based upon the theory that if an overpayment in one year is applied against a deficiency in another year and the net result is a deficiency, the condition exists which gives the Board jurisdiction to consider all the years involved. But the statute is concerned with a taxable year and not with a balance that may be struck over a period of years. Otherwise, injustice and discrimination might be worked, because the grouping of several years

might in some cases prevent a taxpayer from having any right of appeal. The right of appeal should not be affected by the fact that the Commissioner finds it convenient to audit at one time the returns of a taxpayer for several years instead of auditing for each year separately at intervals, or, perhaps, give him a right of appeal as to some years, which he would not have if the taxes for those years had been considered at different times. In the case here, if the Commissioner had determined a deficiency in the 1919 tax and an overassessment as to 1918, which, when offset against 1919, would leave a balance in favor of the taxpayer, and hence no deficiency for the two years taken together, the Oesterlein Company, on its own theory, would have been deprived of the right of appeal from the determination of the deficiency for 1919. That it was the intention of Congress to determine the existence of a deficiency by reference to a single taxable year is borne out by a provision inserted in the Revenue Act of 1926. Section 274 (g) of that act (c. 27, 44 Stat. 9, 56, U. S. C., App., Title 26, Sec. 1049b) provides that "the Board in redetermining a deficiency in respect of any taxable year * * * shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."

The express limitation of the Board's jurisdiction contained in the 1926 Act was declaratory of the existing limitation intended by Congress. Thus, during the debate in the Senate on the Revenue Act

of 1924, an amendment to extend the jurisdiction of the Board to refund and overpayment cases was proposed, criticized, and withdrawn, the principal criticism being because it would so largely multiply appeals as to require a membership on the Board running into hundreds. (Cong. Rec., Vol. 65, pp. 7696–7697.)

The Board of Tax Appeals has held that under the Act of 1924 it had power to review the decision of the Commissioner as to each of a series of tax years considered together merely because a net deficiency for the series of years taken together had been determined. (*Appeal of E. J. Barry*, 1 B. T. A. 156.)

It has been held that under the Revenue Act of 1926 it has no such jurisdiction. (*Appeal of Cornelius Cotton Mills*, 4 B. T. A. 255.)

II

CONGRESS DID NOT INTEND THAT THE BOARD OF TAX APPEALS SHOULD HAVE JURISDICTION TO REVIEW THE COMMISSIONER'S COMPUTATION OF A WAR-PROFITS AND EXCESS-PROFITS TAX MADE PURSUANT TO THE PROVISIONS OF SECTIONS 327 AND 328 OF THE REVENUE ACT OF 1918, OR TO REVIEW HIS DECISION THAT NO CASE EXISTED FOR THE APPLICATION OF THE SPECIAL ASSESSMENT METHOD

Assuming, for argument's sake, that we are wrong in the contention that, as no deficiency was determined for 1918 alone, the Board of Tax Appeals could not review the decision of the Commis-

sioner respecting the 1918 tax, there remain the points that in dealing with that year the Board was bound by the results arrived at by the Commissioner in applying the special-assessment provisions and that, in considering the 1919 tax, the Board could not overturn the decision of the Commissioner that no reason existed for applying the special-assessment provisions.

Sections 327 and 328 of the Revenue Act of 1918 were enacted for the benefit of the taxpayer. The object which Congress sought to accomplish in enacting these sections was to provide a special method of computing the tax, which would not be greater (and in most cases would be lower) in amount than if the tax had been computed under Sections 301 and 302 of the 1918 Act.

In the Revenue Act of 1917, Section 210 provided that if the Secretary of the Treasury was unable in any case satisfactorily to determine the invested capital, the tax should be based upon a method of computation which was similar to that later provided in Sections 327 and 328 of the 1918 Act. As the result of experience in the application of the provisions of Section 210 of the 1917 Act, Congress recognized not only its benefits, but the need of its extension. This is made clear by reference to the Report of the Senate Committee on Finance with respect to the 1918 Act (Senate Report 617, 65th Congress, 3rd Session, page 14). In this report it was said:

No part of Title III is as important as the so-called relief provisions. The business world is apprehensive about the operation of the war excess-profits tax, and it is true that the ordinary method of computing invested capital would in certain exceptional cases work great hardship. There is a measure of truth, for instance, in the current criticism that the war excess-profits tax places a heavy penalty on conservative financing and a corresponding premium on overcapitalization.

The committee therefore believes it necessary to provide a special method of determining the tax for those cases in which the ordinary method of assessment would result in grave hardship or serious inequality. To do this is not to confer an arbitrary discretion upon the administrative authorities; it is merely an exercise of the legislative power of reasonable classification. Indeed without such classification the constitutionality of the whole tax might, because of its unequal operation, be open to serious question.

The committee has materially increased the number of cases for which the House bill grants relief. It is not necessary here to enumerate these cases. It is sufficient to say that they represent the principal classes of cases which a year's experience with the excess-profits tax prove to be in need of special treatment. The committee moreover believes that these relief powers should not be hidden under vague and general phraseology. The business world is apprehensive of the opera-

> tion of a war excess-profits tax at the high rates which war exigencies make necessary. It is entitled to be reassured, explicitly and frankly, by the enactment of carefully safeguarded provisions for the relief or prevention of injustice and inequality.

This language shows that it was the intention of Congress that Sections 327 and 328 of the 1918 Act should be remedial. It was not contemplated that under this special method of computation a corporation would be assessed a higher tax than would be imposed if the computation were made under 301 or 302. In its brief below the respondent went so far as to state that (page 14) "taxes may not be raised under Section 328 over what they would be if computed under Sections 301 or 302."

Whether or not this statement be correct, the Senate Report evidences the intent of Congress to prevent great hardship and serious inequality in the operation of the tax law. Exercising the legislative power of "reasonable classifications," Congress divided corporation taxpayers into two groups. It placed in the first group those corporations upon which it believed no inequality would be imposed by the computation of taxes according to the method prescribed in the general assessment provisions. In the second group it included all those corporations which by reason of certain recognized conditions would suffer inequality if taxed according to the general assessment provisions. For this second group of corporations, therefore, the

special method of assessment was provided. The majority of corporations would fall within the first group and comparatively few within the second. But the two groups of taxpayers were recognized and provision for them was made in the Act in order that the system of taxation would operate as equitably as practicable.

The method of taxation prescribed in the general assessment provisions is based upon the principle that it is capable of definite, equitable application in the majority of cases, and the administration of these provisions permits of little, if any, latitude of judgment and discretion.

The administration of the provisions relating to the special method of assessment, however, presents in every case a problem requiring the exercise of sound discretion and discriminating judgment, in order that substantial equality may result in the administration of the Revenue Act. It was for the accomplishment of this purpose that Congress expressly provided, particularly in paragraphs (a) and (d) of Section 327 of the 1918 Act, that reliance be placed on the discretion and judgment of the Commissioner of Internal Revenue.

Congress must have recognized that it would be difficult to have uniformity in the administration of the special assessment sections unless the power to grant relief under these sections was vested exclusively in the Commissioner.

Under the decisions of this Court a determination by the Commissioner of the questions involved in those sections is final and conclusive and not subject to judicial review, unless the determination was clearly arbitrary or capricious, and that question is not presented here. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Silberschein* v. *United States,* 266 U. S. 221.

Sections 327 and 328 of the Revenue Act of 1918, by reason of the expressions used and the nature of the subject matter dealt with, contemplated that the granting of relief to taxpayers in the form of special assessment under these sections was a matter entrusted to the discretion of the Commissioner, the only check on the exercise of that discretion (in the absence of charge of bad faith or arbitrary action) being the requirement that he should make his determination a matter of record and should report to Congress the cases in which he had applied the special-assessment provision.

Section 327 (a) provides that the tax shall be determined under Section 328 "where the Commissioner is unable to determine the invested capital." Subdivision (c) provides that Section 328 shall be applied if "the Commissioner is unable satisfactorily to determine the respective values of the several classes of property," etc. Subdivision (d) provides that the special assessment allowed in Section 328 may be applied where, upon application by the corporation, "the Commissioner finds and so de-

clares of record" that the tax, if determined without the benefit of this section, would work exceptional hardship, evidenced by gross disproportion between the tax computed without the benefit of the section and the tax computed by reference to the representative corporations specified in Section 328. These provisions, fairly construed, indicate that it is the Commissioner who must be unable satisfactorily to himself to determine these things, and it must be the Commissioner who finds and so declares of record that hardship would result, and it must be the Commissioner who is unable to determine invested capital, as provided in Section 326, before special assessment shall be granted.

So, in Section 328, dealing with the making of the special assessment, it is provided that "the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined," and that the "ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner," and that "the Commissioner shall keep a record of all cases in which the tax is determined" by special assessment and report it to Congress when requested.

The decision below is to the effect that the special-assessment provisions in Section 328 may be applied if the Board of Tax Appeals or a court or jury is unable to determine the invested capital or if the Board or the courts are "unable satisfac-

torily to determine" the respective values of classes of property paid in for stock, or if the Board or a court or jury "finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions," impose hardship, and that it is open to the Board of Tax Appeals, and, consequently, to a court and a jury, to examine the mass of confidential material available in the Bureau of Internal Revenue respecting the business and taxes of other taxpayers engaged in the same line of business, and to compel the production of original evidence from such taxpayers in order to enable the Board or court or jury, as the case may be, to make the comparison with representative corporations and determine through such comparison an equitable rate of taxation. It is hard to believe that Congress intended any such result.

The respondent claims, and the courts below held, that the general provisions of the 1924 Act, giving the Board of Tax Appeals jurisdiction to review on appeal determinations by the Commissioner that deficiencies exist in the amount of the tax paid for any year by a taxpayer, give the Board power to review the determination of the Commissioner, which may enter into the determination of the deficiency, that the taxpayer is not entitled to special assessment, or, if he is, the determination as to what the rate should be by comparison with repre-

sentatives. This result does not follow from the general provisions giving jurisdiction to the Board to review determination of deficiencies. The provisions of the 1924 Act respecting jurisdiction of the Board and the provisions of Sections 327 and 328 of the 1918 Act should be construed together, and it should be held that the general power to review the determination of the Commissioner that a deficiency exists is subject to the qualification in special-assessment cases that, in so far as the determination of the Commissioner under the special-assessment provisions enters into the determination of the deficiency, his findings must be accepted by the Board, with the result, in cases like the present, that, where the review asked of the Board respecting a determination of deficiency involves *only* a review of the Commissioner's findings under the special-assessment provisions, the Board is without power to disturb them. To put it in another way: On an appeal, taken to review a determination as to a deficiency, whenever it appears to the Board, as it did appear in this case, that no question is raised except the propriety of the Commissioner's findings under the special-assessment provisions, the Board should cease to proceed further and should dismiss the appeal or affirm the finding of the Commissioner and not attempt to compel the production of evidence to enable it to review his finding. To support this construction of the statute, it is proper to emphasize the fact that the

construction adopted by the court below will result in opening to public inspection, at the instance of any taxpayer engaged in a particular line of business, the reports and confidential information on file with the Bureau of Internal Revenue of all other taxpayers engaged in a similar line of business, and will result further—since the courts may review the Commissioner's finding if the Board may—in the compulsory production before judicial tribunals and juries of original evidence from other taxpayers engaged in similar lines of business, in order to enable the court to determine, by comparison with representative corporations, the rate of taxation that should equitably be applied. This is so because in no case in which the Board may review the findings of the Commissioner, or a court may review those findings, are these tribunals limited to considering the evidence available in the files of the Bureau of Internal Revenue. No construction of the statute should be adopted which results in publicity of tax returns and confidential information which have been so carefully guarded by the other provisions of the Revenue Acts.

The decisions of the Court of Claims in *Williamsport Wire Rope Company* v. *United States,* decided May 2, 1927 (not yet reported and pending in this Court on certiorari), and of the District Court of the United States for the Northern District of Ohio in the *Feilbach Company* v. *Niles,* decided March 25, 1927, and not yet reported, both dealing

with this subject, are printed in the appendix hereto.

Respectfully submitted.

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SEPTEMBER, 1927.

APPENDIX A

Court of Claims of the United States. No. D–1050.
(Decided May 2, 1927)

THE WILLIAMSPORT WIRE ROPE COMPANY *v.* THE UNITED STATES

ON DEMURRER

BOOTH, *Judge*, delivered the opinion of the court:

This is a tax case. The petition alleges a right of recovery upon two items. To the first item the defendant demurs. The facts alleged to sustain the cause of action are as follows: The plaintiff, a Pennsylvania corporation engaged in the manufacture of wire rope, on June 15, 1919, filed with the Collector of Internal Revenue for the proper district its income-tax return for the year 1918. Plaintiff then conceded an income, excess, and war tax liability upon the return so filed of $306,381.77, and the same was duly paid in four installments without protest. Subsequently the Commissioner of Internal Revenue, through Revenue Agents, made an examination of plaintiff's books of account, and on April 14, 1920, advised the plaintiff that a revised computation of its income-tax return had increased its tax liability for the year 1918 to the extent of $89,094.85. Plaintiff protested this action of the Commissioner, but the Commissioner made the additional assessment, and it was finally paid by the plaintiff under protest. Thereafter the Commissioner discovered an error in his computation resulting in an overpayment of

$12,393.09, which amount was on June 10, 1924, refunded to the plaintiff, leaving an aggregate tax assessed, levied, and paid by the plaintiff upon its return of $383,083.53.

On June 14, 1924, the plaintiff filed with the Commissioner a claim for a refund of $100,000, stating therein that the amount so claimed represented the amount by which its tax computed under section 301 of the Revenue Act of 1918 exceeded its tax computed under Sections 327 and 328 of the Revenue Act of 1918, insisting upon a right to have its tax liability computed in accordance with Sections 327 and 328 (*supra*). The Commissioner declined to refund. The petition further alleges that as a matter of fact as well as law plaintiff is entitled to have its excess-profits tax and war-profits tax computed in accordance with Sections 327 and 328 of the Revenue Act and not under the provisions of section 301 of the same law. To this end the allegation is made that it is impossible for the Commissioner or anyone else to determine the correct amount of plaintiff's invested capital as defined in section 326 of the Revenue Act of 1918; that abnormal conditions exist affecting the capital and income of the plaintiff which work upon it an exceptional hardship, evidenced by gross disproportion between the tax paid by it and its tax computed by reference to representative corporations engaged in the same trade or business. To sustain this allegation particular instances are cited. First, it is alleged that plaintiff pursued a policy of charging large sums expended for plant additions and improvements to an expense account and not to capital; second, that prior to the year 1918 plaintiff developed valuable secret processes essential to the

profitable operation of its business, and no part of the cost thereof has ever been capitalized, and the Commissioner ignored this fact in making up his adjustment of plaintiff's invested capital; third, that plaintiff, since its organization, has never undergone a reorganization or merger, but has since its organization in May, 1887, conducted an increasing and important business and thereby acquired a good will which asset is not recorded on its books and the value thereof was ignored by the Commissioner in ascertaining plaintiff's invested capital; that under regulations of the Commissioner, its good will is an asset of the value of $1,037,713; fourth, that plaintiff, during the year 1918 borrowed money to use in its business; that on January 1, 1918, plaintiff was using in its business $114,834.91, borrowed funds, and on December 31, 1918, for a like purpose was using $122,353.82; that its capital stock was $100,000; that at the beginning of the year its percentage of borrowed money to capital stock was 114.8 per cent, and at the end of the year 122.3 per cent; fifth, it is alleged that the salaries of its officers were abnormally low, averaging but 3.76 per cent of its taxable income for the year, and finally concluding with the allegation that a comparison of the rate of tax imposed upon the plaintiff with the rate imposed upon representative corporations engaged in a like trade or business would disclose the fact that as to the plaintiff the rate exacted is 63.87 per cent of its taxable income, whereas as to representative corporations the rate is not in excess of 55 per cent of their taxable income. The prayer for judgment is somewhat obscure. If we correctly apprehend it, suit is for the

recovery of $100,000 on this item with interest thereon from date of the payment of the final installment, viz: December 31, 1919.

Sections 327 and 328 of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1093) provide in terms as follows:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other

income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments

shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid, together with interest at the rate of one-half of 1 per centum per month, on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Section 326 of the Revenue Act of 1918 (40 Stat. 1092) defines invested capital and is in terms as follows:

"(a) That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section);

"(1) Actual cash bona fide paid in for stock or shares;

"(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in Section 257;

"(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

"(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the

total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

"(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided*, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

"(b) As used in this title the term 'invested capital' does not include borrowed capital.

"(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

"(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

" The average invested capital for the pre-war period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years."

A tax case in this court is a suit against the United States founded under our jurisdictional act (Section 145, Judicial Code) upon a law of Congress. The right to sue for internal-revenue tax is conditioned upon its payment, application for a refund and denial of the same. *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States,* 254 U. S. 141. Under the allegations of the petition, heretofore recited, it is obvious that the present suit is for a recovery of an alleged illegal tax exaction resulting from the alleged failure of the Commissioner to apply to plaintiff's tax return the applicable sections of the revenue law—i. e., Sections 327 and 328, *supra.* Plaintiff does not allege that if section 301 of the Revenue Act of 1918 has been legally applied in the assessment and levy of the taxes involved, an over or illegal assessment follows, and judgment for the amount paid thereunder is recoverable. On the contrary, the gravamen of the complaint is that Sections 327 and 328 of the Statute are the applicable sections of the law under which the assessment and levy should have been made, and if so made, would result in a difference of $100,000 in the amount paid and what should have been paid. The court is manifestly without authority to *compute* a tax under Sections 327 and 328 of the Revenue law. The Commissioner has refused to apply the sections as requested, and we have no means to compel him to do so. Sections 327 and 328 of the statute point out the method to be pursued by the Commissioner in applying special assessment. In his office, and available to him, are the facts, the records, voluminous and important, upon which the Commissioner relies in making comparisons with representative

corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the Commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the Commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

Plaintiff admits that internal-revenue taxes are justly due from it to the United States. The issue presented by the petition goes only to the amount. We are not asked to set aside the assessment and levy made under section 301 and award judgment for all the taxes paid thereunder. The relief sought by the plaintiff is a judgment founded upon a law of Congress under which the plaintiff has not incurred a tax liability, under which it has been assessed no taxes, and under which it has paid no taxes. The plaintiff's taxes were assessed under Section 301. They were levied and collected under that section, and no complaint is made that if the section is applicable the amount assessed and paid is illegal. The plaintiff, in our view of the case, has mistaken the remedy. As said by the Supreme Court in the *Rock Island case, supra,* "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with." Clearly the plaintiff has paid no taxes under Sections 327 and 328 of the statute. The Commissioner has not levied or assessed any under the sections, and no claim for refund has been made or refused for any sum or sums exacted

of the plaintiff under the above sections. What sum the Commissioner might exact or might have exacted under the special assessment provisions relied upon is a problem with which under the petition we are not concerned, and until he does apply the provisions the court is powerless to proceed.

In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the Commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special-assessment sections. Plaintiff did not in the beginning question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under Section 326. The presumption is that the Commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the Commissioner found the statutory difficulties which precluded an assessment under Section 301. On

the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder, and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. *Louisiana* v. *McAdoo,* 234 U. S. 627; *United States* v. *Babcock,* 250 U. S. 328; *Ray Consolidated Copper Co.* v. *United States,* 268 U. S. 373.

The demurrer to the first item of the petition will be sustained, and as to that item the petition is dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice,* concur.

APPENDIX B

In the District Court of the United States for the Northern District of Ohio, Western Division. *The Feilbach Company, plaintiff*, against *Frank B. Niles, Collector of Internal Revenue, defendant.* At law, 3185

MEMORANDUM OPINION

KILLITS, J.:

Section 210 of the Revenue Act of 1917 must be considered to be an administrative provision for the guidance of the Commissioner of Internal Revenue in the determination of invested capital, upon which computation of excess-profits tax may be made in those somewhat unusual occasions when the very definite section (207) can not be applied. It seems obvious that the circumstances which would clothe the Commissioner with the discretion to apply Section 210 would occur somewhat rarely in the administration of the law, because Congress was somewhat meticulous in its definition of what invested capital should be considered to be, and how it should be ascertained, in the writing of Section 207, whose terms manifestly would meet the conditions in a vast majority of cases.

The section under consideration, 210, is one whose provisions are to be invoked primarily and most generally by the Commissioner alone. Very, very rarely, and under quite extraordinary circumstances, it would seem, can the section be resorted to as a mode of relief by the taxpayer. The statute limits resort to it to only when the Commissioner

finds that he can not "satisfactorily" ascertain invested capital for the computation of excess-profits tax under Section 207. It would follow that, if the Commissioner or his agents actually computes capital under 207, his action should be presumed to exclude any application of Section 210, the burden then being upon a claimant to relief under the provisions of the latter section to show that the Commissioner acted arbitrarily and without justification. It would be a rare case, indeed, wherein a court would be justified in concluding that the Commissioner could not "satisfactorily" apply the provisions of Section 207 to a determination of the question, when, in fact, the Commissioner satisfied himself that he could so do.

Reading the allegations of the petition in light of this consideration of the statutes in question and the Commissioner's action thereon, we find no reason for the interposition of the court in the form of a review of his judgment.

It is evident that Congress, in framing Section 207, intended not only to prevent vague and difficult determinations through the examination of circumstances hard to establish, but to set up standards of determination so rigid and so easily applicable that only a very extraordinary condition would justify a determination that the section was not workable. *Cartier* v. *Doyle,* 277 Fed. 150; *La Belle Iron Works* v. *United States,* 256 U. S. 377. Applying the authorities just cited and going to the four reasons set up as indicating that the Secretary of the Treasury in the instant case could not satisfactorily determine invested capital, we are unable to find that such a conclusion is a proper deduction. Section 207 seems to this court to read to the ex-

clusion of any one of these four alleged facts; nor do the four of them cumulated tend to take the present situation out of the operation of the section in question, and, therefore, afford the plaintiff relief. On the contrary, as we read Section 207, it negatives the ability of the taxpayer to resort to any of these reasons to exonerate it from the provisions of that section.

The demurrer, therefore, to the petition is sustained.

——— ———, *Judge.*

MARCH 25, 1927.

Office Supreme Court, U. S.
FILED
APR 21 1927
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted] 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

OESTERLEIN MACHINE COMPANY, A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE OESTERLEIN MACHINE COMPANY IN OPPOSITION.

JOHN J. HAMILTON,
ROBERT N. MILLER,
J. ROBERT SHERROD,
Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1016.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

OESTERLEIN MACHINE COMPANY, A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE OESTERLEIN MACHINE COMPANY IN OPPOSITION.

Opinions Below.

The opinion of the Court of Appeals of the District of Columbia will be found at page 42 of the record. The decision of the United States Board of Tax Ap-

peals will be found at page 16 of the record and in 1 B. T. A., 159.

Jurisdiction.

The judgment sought to be reviewed was entered January 3, 1927 (R., 46). Jurisdiction of this Court is conferred by chapter 347, of Title 28, U. S. Code (1926).

Question Presented.

The question presented is whether the United States Board of Tax Appeals has jurisdiction to review and, if necessary, redetermine *all* deficiencies in income and profits taxes determined and proposed for assessment by the Commissioner of Internal Revenue after the enactment of the Revenue Act of 1924.

Statutes and Legislative History.

The *tax-computing* sections of the statutes involved are sections 327 and 328, Revenue Act of 1918 (40 Stat., 1057, 1093). These sections read as follows (the italics herein are ours):

> "SECTION 327. That in the following cases the tax shall be determined as provided in section 328:
>
> "(*a*) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> "(*b*) In the case of a foreign corporation;
>
> "(*c*) Where a mixed aggregate of tangible property and intangible property has been paid

in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

"(*d*) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section, would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions or other income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive."

"SECTION 328. In the cases specified in section 327 the tax *shall be* the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or

similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation, the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

"In computing the tax under this section the Commissioner *shall compare* the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

"(*b*) For the purposes of subdivision (*a*) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

* * * * * * *

"(*c*) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (*a*), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to

such cases when required by resolution of either House of Congress, without regard to the restrictions contained in Section 257."

(40 Stat., 1057, 1093.)

The provisions of the Revenue Act of 1918, dealing with administrative procedure and methods of appeal (other than to the courts) are contained in Section 1301 (*d*), Revenue Act of 1918 (40 Stat., 1057, 1141), and read in part as follows:

"(*d*) (1) There is hereby created a board to be known as the 'Advisory Tax Board,' hereinafter called the Board, and to be composed of not to exceed six members, to be appointed by the Commissioner with the approval of the Secretary. The Board shall cease to exist at the expiration of two years after the passage of this act, or at such earlier time as the Commissioner with the approval of the Secretary may designate. * * *

"(2) The Commissioner may, and on the request of any taxpayer directly interested shall, submit to the Board any question relating to the interpretation or administration of the income, war-profits or excess-profits tax laws, and the Board shall report its findings and recommendations to the Commissioner.

"(3) The Board shall have its office in the Bureau of Internal Revenue in the District of Columbia. The expenses and salaries of members of the Board shall be audited, allowed, and paid out of appropriations for collecting internal revenue, in the same manner as expenses and

salaries of employees of the Bureau of Internal Revenue are audited, allowed, and paid.

"(4) The Board shall have the power to summon witnesses, take testimony, administer oaths, and to require any person to produce books, papers, documents, or other data relating to any matter under investigation by the Board. Any member of the Board may sign subpœnas and members and employees of the Bureau of Internal Revenue designated to assist the Board, when authorized by the Board, may administer oaths, examine witnesses, take testimony and receive evidence."

Under date of September 27, 1919, Daniel C. Roper, then Commissioner of Internal Revenue, made the following public announcement, which is reported at paragraph 866, Corporation Trust Company, War Tax Service (1922):

"Taxpayers in many parts of the country have expressed interest in the plans of the Bureau for continuing the important work entrusted to the Advisory Tax Board. The function of the Board has been to review, upon appeal, the administrative decisions of the Income Tax Unit in important income and excess profits cases, particularly cases involving exceptional or unusual conditions with respect to questions of invested capital, amortization, depletion, depreciation, etc. The newly organized Committee on Review and Appeals will take over this highly important function, and taxpayers are assured of the same thoughtful and im-

partial consideration of their problems that has been a feature of the work of the retiring Board.

"The individual members of the Committee on Review and Appeals will be selected with the greatest care from our most experienced men in order that their combined judgment may represent the best experience and highest intelligence of the Bureau's personnel. I am confident that this body of men will continue in a most satisfactory manner the work inaugurated by the Advisory Tax Board and taxpayers may be assured of courteous, intelligent and impartial hearings." (Announcement by Commissioner Daniel C. Roper, dated September 27, 1919.)

This Committee on Appeal and Review acted as the appellate body reviewing decisions of the Commissioner's auditors in the Income Tax Unit until shortly after the enactment of the Revenue Act of 1924 when it was abolished. (See T. D. 3616, Int. Rev. Cum. Bull. III-2, page 275.)

The administration of the Bureau of Internal Revenue was on and after March 14, 1924, the subject of a special investigation by a select committee appointed by the 69th Congress, Senate Resolution 168, and the Commissioner's determination of tax liability under the provisions of Sections 327 and 328, Revenue Act of 1918, was one of the especial subjects investigated. (Report No. 27, Senate, 69th Congress, 1st Session, pages 213-222. Report No. 27, Part 2, Senate, 69th Congress, 1st Session, pages 247, 284.)

Thereafter, in the course of the enactment of the Revenue Act of 1924 the following reports were made

by the Senate and the House Committees. (Quoted in part.)

Extracts from the Reports of the House and Senate Committees as to Conditions which Caused Congress to Create the Board of Tax Appeals.

"The Committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal *prior to the payment of an additional assessment* of income, excess-profits, war-profits, or estate taxes." (House Report No. 179, 68th Congress, 1st Session, p. 7.)

"*Under the existing law a taxpayer prior to the payment of his tax may appeal to the Commissioner, who has established the Committee on Appeals and Review, to determine these appeals for him.* The objections that have been raised to this procedure are four: (1) The appeal is from the action of the Bureau of Internal Revenue but is taken to a committee in and a part of the bureau. It is urged that *such an appeal does not involve a review by an impartial outside body,* such as the taxpayer is entitled to prior to payment of the tax. (2) In the hearing on the appeal the person who is to decide the appeal acts *both as advocate and judge,* since he must both protect the interest of the Government and decide the questions involved. Such conditions do not insure an impartial determination of the case. (3) If the decision on the appeal is in favor of the Government, the taxpayer has the right to test the correctness of the decision in the courts, but if the decision is in favor of the taxpayer, the action of the bureau is final and the correctness of the decision can

never be tested in the courts. It is contended that this condition results in the decision of most doubtful points in favor of the Government. (4) The taxpayer is usually forced to come to Washington for the hearing on his appeal, an expensive and burdensome procedure." (Id., pp. 7 and 8.)

"*To meet the objections given above, the committee recommends that there be established a Board of Tax Appeals.*" * * * "*Both the Government and the taxpayer will appear before the Board and present their cases, and the decision of the Board will be final as to the amount of tax to be paid.*" (Id., p. 8.)

"The bill provides for the establishment of a Board of Tax Appeals to which a taxpayer may appeal *prior to the payment of an additional assessment* of income, excess-profits, war-profits, or estate taxes. * * *"

"Under the existing law a taxpayer prior to the payment of his tax may appeal to the Commissioner, *who has established the Committee on Appeals and Review to determine these appeals for him.*"

"Under the provisions of the proposed bill creating a Board of Tax Appeals the taxpayer may, *prior to the payment of the additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the Board of Tax Appeals* and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal *both the Government and the taxpayer will appear before the Board to present their cases,* with the result that each member of the Board will sit solely as judge and not as both judge and advocate.

* * * *This proposal meets all the objections that have been raised as to the existing system* and at the same time provides for a flexible and informal procedure which will permit the Board to determine expeditiously the cases brought before it on appeal." (Senate Report 398, 68th Congress, 1st Session, pp. 8 and 9.)

The pertinent provisions of the Revenue Act of 1924 creating the Board of Tax Appeals read as follows:

> "SECTION 900 (*a*) There is hereby established a Board to be known as the Board of Tax Appeals (hereinaftter referred to as the Board). * * *"
>
> "(*e*) The Board and its divisions shall hear and determine appeals filed under Sections 274, 279, 308 and 312. * * *"
>
> "(*i*) For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board may administer oaths, examine witnesses, and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, (2) the taking of a deposition before any designated individual competent to administer oaths under this act, and (3) the answer in writing under oath to any question of fact submitted. * * *"
>
> "(*k*) * * * The Board shall be an independent Agency in the Executive branch of the Government." (43 Stat. 253, 336.)

Section 273 provides:

"SECTION 273. As used in this title the term 'deficiency' means—

"(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, or refunded, or otherwise repaid in respect of such tax; or

"(2) If no amount is shown as the tax by the taxpayer * * * upon his return, or if no return is made by the taxpayer then the amount by which the tax exceeds the amounts previously assessed." (43 Stat. 253, 273.)

Section 274 provides:

"SECTION 274 (*a*) If in the case of *any* taxpayer the Commissioner determines that there *is a deficiency* in respect of the tax imposed by this *title*, the taxpayer, except as provided in subdivision (*d*) (the emergency assessment provision) shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by Section 900.

"(*b*) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount

> determined as a deficiency by the Commissioner but disallowed as such by the Board, shall be assessed, but a proceeding in court may be begun without assessment, for the collection of any part of the amount so disallowed." (43 Stat. 253, 297.)

Section 280 provides that while taxes imposed by acts prior to the Revenue Act of 1924 are computed under those acts, they are to be assessed, collected and paid in the same manner and subject to the same provisions and limitations as taxes imposed under the Revenue Act of 1924. (43 Stat. 253, 301.)

STATEMENT.

We have no objection, for the purposes herein, to the petitioner's statement of the facts except in the following particulars:

(1) On page 3 of his petition he states that, in respect to 1918, he determined the rate of tax by comparison with "representative corporations" as provided in Section 328. One of the issues in the case before the Board is whether the petitioner compared respondent with "representative corporations," therefore this statement is denied.

(2) On pages 5 and 6 of his petition he states that the subpœna called for a complete disclosure to the respondent and the Board of Tax Appeals of "returns," etc. The respondent refers to Exhibit F (R., pages 26-29) and Exhibit G (R., pages 29-31) and calls

attention to the fact that neither the application nor the subpœna mentions the word "return." The respondent asked for only such data as was made pertinent and necessary by the provisions of Section 328 and which a representative of the Commissioner testified was considered by his office in similar cases. The Court of Appeals, in its decision, commented on the fact that respondent's application for a subpœna was "sufficiently specific to limit the data called for, to the particular records relevant to the case under consideration." (R., page 46.)

(3) The petitioner has repeatedly sought in the courts below, and in his brief herein, to give the impression that this case arises solely under the provisions of Section 327 (*d*), Revenue Act of 1918. The petitioner as early as 1929 determined "that owing to defective accounting your statutory invested capital cannot be satisfactorily determined" (R., par. 8, page 2). The case therefore also arose under Section 327 (*a*).

(4) The petitioner's "Reasons for Granting the Writ" are principally criticisms of the effect of the law which Congress has passed. Congress having provided for a review, it is now immaterial that review involves inconveniences. The petitioner refers to possible publicity; there is nothing new in this, since, as elsewhere pointed out, the President's regulations have for years provided that Treasury tax records are public records and any publicity resulting from their use in court is permissible.

The petitioner speaks of Sections 327 and 328 as provisions which grant "relief" by "grace." Since they are definitely enacted into law, to bring about equality, every taxpayer has an absolute right to have them applied to his case. It is not a question of grace. In the case of foreign corporations the law provides for no other way of determining the tax rate except Sections 327 and 328, and cases falling under subdivisions (*a*) and (*b*) of Section 327, Revenue Act of 1918, must be determined under these sections alone.

The petitioner suggests that as much as $100,000,000 might be involved, if the Tax Board or the courts are allowed to review the decisions of the petitioner. Since no substantive point is here involved, the Government will lose nothing if the petitioner's determinations under Sections 327 and 328 have been correct. If the petitioner's determinations have been incorrect, the only result would be that those mistakes would be corrected, and the taxpayers would get what the law gave them but the petitioner denied them, provided the statute of limitation does not interfere.

The petitioner's contentions have been denied by the United States Board of Tax Appeals, the Supreme Court of the District of Columbia, and the Court of Appeals of the District of Columbia, and the petitioner has now asked a further review by this Court on the ground that although Congress provided for review of "a deficiency" proposed for assessment against "any taxpayer," without making any exception, an exception should be implied because of language used in an act the administrative sections of which have been superseded by a new act.

ARGUMENT.

Briefly, the respondent's position is that the Revenue Act of 1924 expressly provides that the United States Board of Tax Appeals might review every tax deficiency which the Commissioner might determine under that or prior revenue acts. There is a net deficiency in this case of $1,126.37 (R., 42). The Board, in reviewing that deficiency, will do so in the light of all the provisions of any law involved, including the sections herein referred to.

Prior to the enactment of the Revenue Act of 1924, only one official of the Executive Branch of the Government had authority to determine the amount of income and profits taxes which could be assessed against any taxpayer. That official was the Commissioner of Internal Revenue. The Revenue Act of 1918 was written and enacted by Congress in the light of the then existing intention.

The office of the Commissioner of Internal Revenue is one of the most difficult and important offices in the Executive Branch of the Government. Whether justly or not, Congress had, early in 1924, criticized the administration of the Bureau of Internal Revenue, and had even gone so far, in March, 1924, as to appoint a committee to investigate its activities. The Revenue Act of 1924 was enacted June 2, 1924, and contained retroactive provisions, applicable to determination of tax under the earlier laws, as well as those under the Revenue Act of 1924, by which administration under

those earlier laws was definitely changed. No longer was the Commissioner of Internal Revenue and his Internal Revenue Bureau the final administrative authority in determining tax assessments. The 1924 Act provided that the Commissioner, except in emergencies, could only *propose* an amount of tax for assessment, and that assessment should be delayed, so as to give the taxpayer an opportunity for the final administrative review. If the taxpayer did not appeal to the new Board of Tax Appeals within 60 days, the Commissioner could assess and collect. If, however, the taxpayer did file an appeal, the Commissioner could not assess the tax until the Board redetermined or approved the amount. The reasons for thus curtailing the powers of the Commissioner is given in the reports of the House Ways and Means Committee and the Senate Finance Committee quoted hereinbefore. In short it was to place the final determination of *deficiencies* in tax in the hands of a Board divorced from the control of the Treasury Department or its Bureau of Internal Revenue.

It was evident that during the earlier years of its life the Board would require more members than it would later. Congress therefore refrained from establishing a court, involving life-tenure for each judge, and created a Board which is "an independent agency in the Executive Branch of the Government," at the same time giving it facilities for trying the appeals *de novo*, with full power to compel the production of evidence.

It has been admitted all along that the Board of Tax Appeals could not reach correct results in the appeal of this respondent without having before it the data called for in the subpœna. Furthermore, the Commissioner has taken the position many times before the Board that his own records are the best evidence as to the amount and percentage of tax assessed against other corporations, and has opposed the taking of depositions of officers of other corporations on that ground. The real crux of the matter is that the Commissioner thinks Congress was unwise in providing that his findings should be reviewed by a Board independent of his Bureau. Preferring the provisions of the acts which left him the final administrative authority, the Commissioner seeks to ignore the fact that Congress has made a law which changes the administrative determination of taxes under the earlier laws and provides a review "in respect to 'any taxpayer' who files an appeal in respect to 'a deficiency.'" The Commissioner bases his brief on the war legislation, and does not attempt to reconcile his position with the retroactive legislation which was enacted by an administration elected on a campaign slogan of return to the normal.

While the petitioner may deem Congress unwise in placing the determination of deficiencies in the hands of a Board, without excepting any of such deficiencies, we submit that the intention of Congress is clear that every deficiency shall be reviewed, and that it is beside the point to consider the wisdom or folly of what Congress has enacted.

It is difficult for the respondent to understand why the petitioner herein claims no board or court may review his determination of taxes under Section 328, Revenue Act of 1918, when he has in other cases *acquiesced* in changes resulting from such reviews. In the appeal of the Viscose Company, 3 B. T. A., 444, the Commissioner had refused to determine the tax under this section and the Board reversed the Commissioner's decision in this respect and ordered a determination under said section. The Commissioner published his acquiescence in this decision (Internal Revenue Bulletin, V-9, 2610). He admitted that he had erred in that case and the records of the Board show that the redetermination resulted in a tax reduction as follows:

1917	$1,466,836 25
1918	1,459,845 29
	$2,926,681 54

The Viscose Company case shows that the petitioner in that case committed error to the extent of nearly $3,000,000 in his application of sections 327 and 328, Revenue Act of 1918, that the Board pointed out such error, and that the petitioner thereupon corrected it. This seems to make it clear that review under these sections is not only feasible, but necessary. In view of petitioner's admissions in that case, his contention that his decisions should be or are final, is not convincing.

The petitioner herein persists in referring to Section 327 (*d*), Revenue Act of 1918, as governing this case. It is true that abnormalities of income and capital exist, but the case also falls within the provisions of Section 327 (*a*) because, under date of April 17, 1920, the Commissioner determined "that owing to defective accounting your invested capital cannot be satisfactorily determined" (R., p. 2, par. 8). If the Commissioner has any "discretion" under Section 327, whether reviewable or not, he has already exercised it and has acknowledged this to be a case for assessment under Section 328. However, the language of Section 328 does not indicate any unreviewable "discretion" on the part of the Commissioner. It provides that "the tax shall be * * *," and "the Commissioner *shall* compare," etc., language which is plainly a command. In many other sections of the 1918 Act, Congress, in the light of the fact that the Commissioner was *then* the *only* tax determining official, used language similar to that found in Section 327. For example, Section 212 (*b*) reads in part in regard to the determination of income—

> "The computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect income * * *" (40 Stat., 1057-1065).

The Commissioner has never claimed unreviewable discretion under the above and the Board and the courts have reviewed his determinations thereunder. See:

Appeal of David Welch, 2 B. T. A., 64.

Appeal of Theresa Goodman, 1 B. T. A., 915.

In re U. S. Metal Goods Company, 4 Fed. (2d), 871.

In re Max Sheinman (C. C. H. (1926), Fed. Ct. Service, p. 7627).

In Section 326 (*a*) (2) invested capital is defined to include—

> "(*a*) Actual cash value of tangible property other than cash bona fide paid in for stock or shares * * * but in *no case* to exceed the par value of the original stock or shares specifically issued therefor, *unless* the actual cash value of such tangible property at the time paid in *is shown to the satisfaction of the Commissioner* to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus; * * *" (40 Stat., 1057, 1092).

The Commisisoner's determination of actual cash value, under Section 326 (*a*) (2), for invested capital purpose has been the subject of review in so many cases before the Board of Tax Appeals and the courts, in which the Commissioner has acquiesced, that it is unnecessary to cite them.

The Board's jurisdiction to review the petitioner's findings under various sections rests on exactly the

same ground as its jurisdiction in cases where the determination is under Sections 327 and 328. It is unreasonable to suppose that Congress would constitute a Board of this kind and yet deprive it of jurisdiction in several large classes of cases where review is most needed.

The result of the petitioner's contentions is in effect that

> (*a*) No foreign corporation may have a review of his determination of its tax liability either before the Board of Tax Appeals or in court.
>
> (*b*) All individuals but only some of the domestic corporations may have such review.

There appears no good reason for assuming that Congress desired the Board of Tax Appeals to have less power and jurisdiction than had its predecessors, the Advisory Tax Board, and the Committee on Appeal and Review. These boards reviewed the Commissioner's determinations under Section 328 and under Section 210 of the 1917 Act (a similar section) and pointed out many errors.

See

A. R. R. 104, 2 C. B. 301.
A. R. R. 110, 2 C. B. 303.
A. R. R. 538, 5 C. B. 301.

The Board of Tax Appeals was established to take the place of the Committee on Appeal and Review and to eliminate some of the congestion in the Federal dis-

trict courts. If Congress had intended that it have jurisdiction of all deficiencies except those determined under Section 328, it could have and would have so provided. When Congress enacted the Revenue Act of 1926 the Board of Tax Appeals had assumed jurisdiction of this case. It could have then changed the situation. It made no such change.

The purpose of Congress in establishing several ways of determining the rate of tax (Sections 301, 302, and 328) was to equalize taxation; otherwise Congress would have provided only one way of determining the rate. For Congress to furnish means of review to one class of taxpayers whose taxes happen to be determined by Section 301 or 302, and deny review to those whose taxes are determinable under certain other sections, would make for inequality, not equality.

The Commissioner's view attributes to Congress the strange intention that all deficiencies of individual taxpayers shall be reviewable, and only some deficiencies of corporation.

While Congress has sometimes provided that an administrative official's decision shall be final, in specific instances where the Government is granting rights (land-grants, for instance), decisions under such laws are not in point in construing taxation laws, especially where express provision for review has been made. Because taxation involves taking, and not giving, Congress has never given the Commissioner of Internal Revenue finality in tax matters. Under each Revenue Act, a taxpayer, after unsuccessfully filing a claim for refund with the Commissioner, is given the

express right to test the propriety of the refund claimed by him, in court. In the Revenue Act of 1924, further administrative review is provided for.

In the lower courts the petitioner strongly insisted that the so-called "secrecy provisions" of the Revenue Acts prohibited the production of the facts desired. In his statement of the "Question" before this Court, he has not referred to this point, but his fifth specification of error inclines in that direction. The lower courts were shown the inconsistency of the petition in that where it serves his purpose he freely produces in court data similar to that asked for in this case. The court of appeals held that "the statute imposing secrecy on the Commissioner are not intended to impede the wheels of justice * * *" (R. 45).

The provisions of Section 900, Revenue Act of 1924, providing that—

> "The Board may require * * * the production of all necessary returns, correspondence and other evidence."

are nothing new or novel in legislation.

The President of the United States had before the enactment of the Revenue Act of 1924 provided that—

> "11. When it becomes necessary for the department to furnish returns or copies thereof for use in legal proceedings, inspection of such returns or copies that necessarily results from such use is permitted."
>
> (See T. D. 2961, 2 C. B. 250, 253.)

The Commissioner with the approval of the Secretary had declared prior to the enactment of the Revenue Act of 1924 that—

> "Income returns filed with the department are public records of the department, and public records in the Treasury Department are of right available as evidence in litigation in Court unless there is some statute making it unlawful to use them as such (citing cases)."
>
> (See T. D. 2962, 2 C. B. 253.)

The Board of Tax Appeals and the Court of Appeals of the District of Columbia have written exhaustive, able opinions in this case. Mr. Justice Hoehling of the Supreme Court rendered an oral opinion to the effect that he thoroughly agreed with the Board's opinion that it had jurisdiction of *all* deficiencies determined after the enactment of the Revenue Act of 1924, where an appeal is taken. There is no conflict of opinion among the courts on the subject. We believe this Court, after reading the decision of the Board and the Court of Appeals, will see there is no reasonable ground for the issuance of a writ of certiorari in this case.

Respectfully submitted,

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Counsel.

April, 1927.

Office Supreme Court, U. S.
FILED
OCT 29 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

OLNEY-LEIN MACHINE COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

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Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

OESTERLEIN MACHINE COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the court below is reported in 17 F. (2d), 663, and is printed at page 44 of the record.

Jurisdiction.

The judgment of the court of appeals for review was entered January 3, 1927 (R., 49). The petition for

certiorari was filed April 2, 1927, and granted pursuant to Section 240(*a*) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

The real issues involved are:

1. Does the United States Board of Tax Appeals have jurisdiction to review and determine all deficiencies?

and if it does:

2. Has the Board authority to compel witnesses to testify as to facts which have, by an act of Congress, been made material to the issue before the Board?

3. In the case of an appeal filed after the enactment of the Revenue Act of 1924 and before the enactment of the Revenue Act of 1926, does the Board have jurisdiction of a net deficiency determined in respect to two years covered by the same deficiency letter?

The Facts and History of the Case.

The petitioner is the Commissioner of Internal Revenue.

The respondent, a corporation, is a manufacturer of machine tools and has its place of business at Cincinnati, Ohio. It duly filed income and profits tax returns for the calendar taxable years 1918, 1919, and 1920 (R., 11). It was a close-held corporation and had poor records to show how much had been invested in plant,

etc., in the past. When the petitioner audited respondent's 1917 income and profits tax return he found that such poor records prevented him from determining accurately and satisfactorily the invested capital of the corporation (R., 2, paragraphs 8 and 10). He, therefore, determined respondent's profits tax liability under the provisions of Section 210, Revenue Act of 1917, 40 Stat., 307, which section is quoted as Appendix A herein.

When the petitioner audited respondent's 1918 return the same conditions existed that had existed in the audit as to 1917, and he determined the respondent's profits tax liability under the provisions of Section 328, Revenue Act of 1918, upon the basis of the average percentage of income paid as profits taxes by corporations determined by the petitioner to be representative. (R., 4, Par. 16. Also, R., 9.)

Upon auditing respondent's 1919 return the petitioner refused to determine its profits tax liability under the provisions of said Section 328, but determined it under Section 301, Revenue Act of 1918, upon the basis of an invested capital which he arrived at in some manner not known to your respondent, although as to prior years he had confessed inability to determine invested capital. (R., 4, Par., 16-18; also, R., 9.)

A final deficiency letter was mailed by the petitioner to your respondent, under date of June 28, 1924, claiming the existence of deficiencies of $10,240.09 for 1919, and $182.45 for 1920, offset in part by an over-assessment of $9,296.17 for 1918, or a net deficiency of $1,026.37 for the three years. The United States Board

of Tax Appeals had just been created under date of June 2, 1924, (Sec., 900, Revenue Act of 1924; 43 Stat., 336; U. S. C. Title 26, Ch. 22, Sec., 1211, *et seq.*,) and the respondent within sixty days after the mailing of said letter, under the provisions of Sec. 274, Revenue Act of 1924, duly filed an appeal to the said Board of Tax Appeals in regard to the calendar taxable years 1918 and 1919, in respect to which years the petitioner had determined a net deficiency of $943.92 (R., 15).

The respondent claimed, among other errors, that as to 1918 the petitioner had erred in that in arriving at the amount of respondent's tax liability under said Section 328 petitioner had obtained an unduly high rate by failing to compare your respondent with corporations which were truly "representative" of your respondent's business, and "comparable" as to the various factors mentioned in said section.

As to the year 1919 the respondent claimed the petitioner erred in failing to compute its profits tax liability under the provisions of said Section 328, and in computing it under Section 301.

No appeal was made as to the year 1920.

The petitioner answered denying most of the allegations (R., 15). The case was set for trial and in preparing for trial your respondent requested said Board to issue an order to take the depositions of certain other taxpayers alleged by the respondent to be "representative" and "comparable" (R., 5, Par. 24). The petitioner moved to strike the application for an order to take depositions on the ground that the Commissioner of Internal Revenue had exclusive and sole

jurisdiction of the determination of deficiencies under Sections 327 and 328. (R., 5, Par. 25.) Arguments on said motion were heard by the Board and, after careful consideration it decided that it had jurisdiction of deficiencies determined under the provisions of said Section 328. (R., 5, Par. 26; also, R., 17.)

The respondent also applied to the Board in accordance with the provisions of Section 900 (*i*), (3), Revenue Act of 1924, for an order requiring the Commissioner to answer in writing under oath certain questions seeking to elicit how he had arrived at the 1918 tax under Section 328, the names of the companies he had determined to be "representative" and "comparable" and certain facts and data in regard to said companies and others which the respondent claimed were more truly "representative" and "comparable," such as the sales, expenses, income and taxes finally determined by the Commissioner to be due from said companies (R., 28).

After a hearing on said application the Board found the facts requested were material to the issue and issued the subpœna.

The Board issued the subpœna only after mature consideration of all the objections raised in this proceeding as will be seen from its very learned opinion (R., page 17, 1 B. T. A., 159). See also the Board's order denying respondent's motion that it proceed in court (R., 36). The Board being a quasi-judicial body, a part of the executive branch of the Government, is given authority to require the attendance of witnesses, the production of returns, books, papers, etc., the taking of depositions, and the answer in writing under

oath to any question of fact submitted. (See 900 (*i*), Revenue Act of 1924.)

If any person refuses to testify or produce records or answer in writing as to any question of fact, it is necessary either for the Board or the aggrieved party to proceed, in accordance with Section 1025, Revenue Act of 1924 to obtain a court order compelling such person to obey the order or subpœna of the Board.

The Commissioner refused to obey the subpœna on the ground the information was confidential, and that to divulge it would violate the provisions of R. S. 3167, and Section 257 (*a*), Revenue Act of 1924 (R., 34). Thereupon the respondent applied to the judges of the Supreme Court of the District of Columbia, in accordance with the provisions of Section 1025, Revenue Act of 1924 (43 Stat., 348; U. S. C., Title 26, Ch. 23, Sec. 1258, *et seq.*), for an order compelling the Commissioner to obey the subpœna and orders of the Board (R., 1). A rule to show cause was issued (R., 38). The petitioner answered (R., 38) and moved to dismiss the respondent's pleading (R., 41). Mr. Justice Hoehling denied the Commissioner's motion and ordered the Commissioner to obey the Board's subpœna and orders (R., 42).

The Commissioner appealed to the Court of Appeals of the District of Columbia (R., 42-43) and after a hearing the latter court affirmed the decree of the lower court. The Commissioner made application to this Court for the issuance of a writ of certiorari, which was granted.

Apparently the petitioner has, in appearing before this Court, abandoned the contention, made below, that

the penal statutes, R. S. 3167, and Sec. 257, Revenue Act of 1924, would be violated.

Summary of Respondent's Argument.

I. The information which the petitioner refused to furnish to the United States Board of Tax Appeals is the best evidence of facts which Congress made material to the issue before said Board and is concededly indispensable if the Board is to review the petitioner's determination of a deficiency involving the application of the special assessment provisions of the revenue acts.

II. The legislative history of the investigation of the Bureau of Internal Revenue and the creation of the United States Board of Tax Appeals shows that it was the intention of Congress to give the Board jurisdiction of *all deficiencies* determined by the petitioner after the enactment of the Revenue Act of 1924, regardless of the extent of the petitioner's authority under prior revenue acts.

III. The statutes conferring jurisdiction on the United States Board of Tax Appeals provide that the Board shall have jurisdiction of *all deficiencies* determined by the petitioner after the enactment of the Revenue Act of 1924, and do not provide for any exception, express or implied, in cases involving the application of the special assessment provisions of the revenue acts.

IV. Even before the enactment of the Revenue Act of 1924, the petitioner had no unreviewable discretion

under the special assessment provisions of the Revenue Act of 1918, as shown by:

(*a*) Reference to Section 327 of said act.

(*b*) Reference to other sections of said act, using language similar to that used in Section 327.

(*c*) Reference to Section 328 of said act.

V. The Board has jurisdiction to review the petitioner's determination for both the years 1918 and 1919, as Section 274 (*g*) of the Revenue Act of 1926 does not affect appeals filed with the Board prior to the enactment of said act.

VI. The recent decisions of the United States Court of Claims, in the case of *Williamsport Wire Rope Company v. The United States*, and of the United States District Court for the Northern District of Ohio in the case of *The Feilbach Company v. Niles, Collector*, are not in point in a case involving the jurisdiction of the United States Board of Tax Appeals.

ARGUMENT.

I.

The information which the petitioner refused to furnish to the United States Board of Tax Appeals is the best evidence of facts which Congress made material to the issue before said Board and is concededly indispensable if the Board is to review the petitioner's determination of a deficiency involving the application of the special assessment provisions of the revenue acts.

This proceeding in the Federal courts is merely incidental to a proceeding in the United States Board of Tax Appeals which has not yet come to trial. It was instituted to assemble evidence for use in the trial before said Board. It apparently has been conceded all along that the said Board could not fully review the action of the Commissioner of Internal Revenue in this case without having produced before it the facts asked for in the subpœna issued by the Board. The Board issued the subpœna only after a hearing and after it had satisfied itself that your respondent was not attempting any "fishing expedition" in the Commissioner's files, and that the facts asked for were material to the issue.

The task of the Board is to determine the tax liability and any resulting deficiency in a trial *de novo* in which the rules of evidence in effect in the District of Columbia govern the procedure. The Board has be-

fore it none of the returns, revenue agent's reports, or other data in the Commissioner's files. It has before it only facts which are plead and admitted in the Commissioner's answer (as a matter of practice the Commissioner admits few facts, except those showing jurisdiction), and such facts as are introduced in evidence by the parties.

The Commissioner's records are the best evidence of the facts asked for in the subpœna. A taxpayer's *returns* are self-serving declarations; many figures thereon being changed by the Commissioner's audit. It should be noted that the respondent has not asked for the production of any return. It has merely asked for testimony as to the income, amount of tax paid, and other data less important, as such figures appeared *after* the Commissioner audited the *returns* of twelve corporations engaged in the same business.

Your respondent, therefore, has requested the production of facts (*a*) which have been made by Congress material to the issue before the Board; (*b*) which are in the form of the best evidence of such facts; and (*c*) which are concededly indispensable if the Board is to review the Commissioner's actions in your respondent's case.

II.

The legislative history of the investigation of the Bureau of Internal Revenue and the creation of the United States Board of Tax Appeals shows that it was the intention of Congress to give the Board jurisdiction of all deficiencies determined by the petitioner after the enactment of the Revenue Act of 1924, regardless of the extent of the petitioner's authority under prior revenue acts.

The Board of Tax Appeals was created by Congress by Section 900, Revenue Act of 1924, and the last sentence of said section provides that:

> "The Board shall be an independent agency in the executive branch of the Government."

The main trend of the petitioner's argument in this case is to the effect that the judgment below should be reversed on the basis of language contained in an act enacted five years before a Board of Tax Appeals was thought of or created by Congress.

Let us consider the legislative history in connection with the establishment of the Board of Tax Appeals.

As early as December 11, 1923, Senator King (Utah) introduced a resolution (Senate Res., 56, Vol. 65, Cong. Rec., p. 231), seeking an investigation of the Commissioner's administration of the Bureau of Internal Revenue, and to consider the advisability of establishing a court or public tribunal to handle tax claims.

Under date of February 21, 1924, Senator Couzens (Michigan) introduced a resolution (Senate Res., 168, Vol. 65, Cong. Record, p. 2947), also criticizing the petitioner's administration and recommending the appointment of a committee to investigate the same.

On March 12, 1924, said resolution was adopted by the Senate.

The subject of the Commissioner's tax determinations under the provisions of Sections 327 and 328, Revenue Act of 1918, was one of the first investigated. On March 20, 1924, the petitioner submitted to said Committee a statement in regard to the difficulties of his administration, and at page 136 thereof appears a statement of the duties of the so-called "Special Assessment Section." As early as March 24, 1924, a former employee in said section of the Bureau of Internal Revenue was called as a witness. His testimony appears at page 203 *et seq.*, of the Reports of the Hearings before the said Committee, and on page 211 thereof, he admits that when he was in the Bureau he selected the *highest* comparatives that he could in arriving at an average tax under said Section 328.

When said Committee rendered its report (Senate Report, No. 27, Parts One and Two, 69th Congress, 1st Session), it set forth fully the facts showing unexplainable and inconsistent action under said Section 328 by the petitioner herein.

The above is cited, not as a criticism of the petitioner herein, but merely to show the situation as it existed in Congress when it considered creating some body independent of the Bureau of Internal Revenue

and the Treasury Department. Needless to say, we do not find in any of the reports of the petitioner's appearances before said investigating Committee any of the claims being made herein about having "unreviewable discretion," etc.

The above Committee was not the only Congressional Committee which considered the existing situation in said Bureau. The House Ways and Means Committee and the Senate Finance Committee shortly thereafter started considering revision of the Revenue Act of 1921, and the following are extracts from the reports of the House and Senate committees as to conditions which caused Congress to create the Board of Tax Appeals:

> "The Committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal *prior to the payment of an additional assessment* of income, excess-profits, war-profits, or estate taxes." (House Report No. 179, 68th Congress, 1st Session, p. 7.)
>
> "*Under the existing law a taxpayer prior to the payment of his tax may appeal to the Commissioner, who has established the Committee on Appeals and Review, to determine these appeals for him.* The objections that have been raised to this procedure are four: (1) The appeal is from the action of the Bureau of Internal Revenue but is taken to a committee in and a part of the bureau. It is urged that *such an appeal does not involve a review by an impartial outside body*, such as the taxpayer is entitled to prior to payment of the tax. (2) In the hearing on the appeal the person who is to decide

the appeal acts *both as advocate and judge,* since he must both protect the interest of the Government and decide the questions involved. Such conditions do not insure an impartial determination of the case. (3) If the decision on the appeal is in favor of the Government, the taxpayer has the right to test the correctness of the decision in the courts, but if the decision is in favor of the taxpayer, the action of the bureau is final and the correctness of the decision can never be tested in the courts. It is contended that this condition results in the decision of most doubtful points in favor of the Government. (4) The taxpayer is usually forced to come to Washington for the hearing on his appeal, an expensive and burdensome procedure." (Id., pp. 7 and 8.)

"*To meet the objections given above, the committee recommends that there be established a Board of Tax Appeals.*"

* * * "*Both the Government and the taxpayer will appear before the Board and present their cases, and the decision of the Board will be final as to the amount of tax to be paid.*" (Id., p. 8.)

"The bill provides for the establishment of a Board of Tax Appeals to which a taxpayer may appeal *prior to the payment of an additional assessment* of income, excess-profits, war-profits, or estate taxes. * * *"

"Under the existing law a taxpayer prior to the payment of his tax may appeal to the Commissioner, *who has established the Committee on Appeals and Review to determine these appeals for him.*"

"Under the provisions of the proposed bill creating a Board of Tax Appeals the taxpayer may, *prior to the payment of the additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the Board of Tax Appeals* and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal *both the Government and the taxpayer will appear before the Board to present their cases,* with the result that each member of the Board will sit solely as judge and not as both judge and advocate."

"* * * *This proposal meets all the objections that have been raised as to the existing system* and at the same time provides for a flexible and informal procedure which will permit the Board to determine expeditiously the cases brought before it on appeal." (Senate Report 398, 68th Congress, 1st Session, pp. 8 and 9.)

We can concede that prior to June 2, 1924, the Commissioner of Internal Revenue was the *sole Administrative official* having authority to determine deficiencies in tax. His actions were reviewable only by the courts, either in a common law form of action against a Collector of Internal Revenue, or against the United States under the so-called Tucker Act.

Congress apparently thought it advisable to divide such authority, and, after the enactment of the Revenue Act of 1924, there were *two* administrative bodies, instead of only one, charged with the above duties. But the Board was to have jurisdiction only where a taxpayer evidenced his dissatisfaction with the Com-

missioner's determination by the filing of an appeal with the Board. If he did appeal, the Commissioner could not assess the tax but must await the Board's determination.

We assert, therefore, that the jurisdiction of the Board in this case depends upon the language of the statute creating the Board, and not upon the language used in an act enacted during the war years when the Commissioner was the *sole* executive official charged with the duty of determining deficiencies.

III.

The statutes conferring jurisdiction on the United States Board of Tax Appeals provide that the Board shall have jurisdiction of all deficiencies determined by the petitioner after the enactment of the Revenue Act of 1924, and do not provide for any exception, express or implied, in cases involving the application of the special assessment provisions of the revenue acts.

The pertinent provisions of the Revenue Act of 1924 are as follows:

Section 273 provides:

> "Section 273. As used in this title the term 'deficiency' means—
>
> "(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a defi-

ciency, and decreased by the amounts previously abated, credited, or refunded, or otherwise repaid in respect of such tax; or

"(2) If no amount is shown as the tax by the taxpayer * * * upon his return, or if no return is made by the taxpayer then the amount by which the tax exceeds the amounts previously assessed." (43 Stat., 253, 273.)

Please note that "deficiency" is defined as a difference without any reference to any particular law or section of any law under which the difference or deficiency is calculated.

Section 274 provides:

"Section 274(*a*) If in the case of *any* taxpayer the Commissioner determines that there *is* a *deficiency* in respect of the tax imposed by this *title*, the taxpayer, except as provided in subdivision (*d*) (the emergency assessment provision) shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by Section 900.

"(*b*) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board, shall be assessed, but a proceeding in court may be begun without assessment, for the collection of any part of the amount so disallowed." (43 Stat., 253, 297.) (Italics supplied.)

Section 280 provides that while taxes *imposed* by acts prior to the Revenue Act of 1924 are computed under those acts, they are to be *assessed, collected and paid* in the same manner and subject to the same provisions and limitations as taxes imposed under the Revenue Act of 1924. (43 Stat., 253, 301.)

The use of the words "any taxpayer" and "a deficiency" in Section 274 are so plain that any exception would have to be very clearly stated to rebut or even cause any doubt as to Congress' intention to make *all* deficiencies reviewable, especially deficiencies determined under Section 328, which had been the subject of special investigation and criticism by the Congressional Committee.

The court below would have had to indulge in *legislation* not *construction* to have held with the petitioner herein.

There is no ground for an *implied* exception in this question. As remarked by the Board in its opinion in this case (1 B. T. A., 159, 161; Record p. 17 *et seq.*),

> "the manner of assessment and collection of all such deficiencies is controlled by Title II of the Revenue Act of 1924, and is applicable to each and every section of the title not expressly excepted."

That this is true is evidenced by the fact that Congress deemed it necessary, in a case intended to be exempted, to make express provision therefor. Such exception appears in Section 278 of the Revenue Act of 1924, which provides, in part, as follows:

> "Section 278 * * * (*b*) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (*a*) of Section 214, or paragraph (8) of subdivision (*a*) of Section 234 of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or proceeding in court for the collection of any such tax may be begun without assessment, at any time."

(The above exception refers to a deduction for the amortization of war facilities.)

Congress also excepted deficiencies in the various excise taxes (all but estate taxes).

The Revenue Act of 1924 is full of express statutory exceptions, showing that Congress always resorted to express statutory exceptions where it intended to make an exception. In fact, it is well recognized that the Revenue Act of 1924 is a marvel of construction in that its draftsmen have by involved cross references attempted to cover every kind of a tax situation which might arise. A reading of the loss and gain provisions, Sections 202, 203 and 204, as well as the above Section 278 (*b*), forcibly illustrates this. Therefore, when we have draftsmen of said Revenue Act, who plainly have tried to leave *nothing* to implication, and when they have drafted and Congress has enacted a law giving the Board jurisdiction of *appeals* filed under Section 274, etc., and when Section 274 provides that in the case of "any taxpayer," the Commissioner determines there is "a deficiency" and such taxpayer appeals, the deficiency can be assessed only after re-

view and determination by the Board, we have absolutely no ground in the Revenue Act of 1924 to indulge in any implication as to the jurisdiction of the Board.

While respondent claims that the language of the 1918 Act cannot properly be considered in construing the *1924 Act*, especially when there was no thought of a Board of Tax Appeals in 1918 and 1919, and the 1924 Act created that innovation, let us analyze the particular sections of the 1918 Act relied upon by the petitioner herein as the grounds for an *implied* exception applicable to the 1924 Act.

War profits taxes were levied on the plan of first allowing to go free from said tax the average rate of profits earned on the capital invested during a "prewar" period. Many corporations were close-held, had been organized as far back as 1850 or earlier, and had not an accurate record of all sums invested in the business. Invested capital was based on *cost* of assets and, in the case of assets paid into a corporation for stock, on the "actual cash value" at the time paid in. Foreign corporations had part of their capital invested in this country and part elsewhere.

Congress foresaw that many corporations could not produce a record of the *cost* of their assets; that great difficulties would arise in determining the "actual cash value" of assets acquired many years ago; and in determining the portion of a foreign corporation's capital applicable to the production of income earned in the United States. It also saw that some corporations which, for instance, had earned profits chiefly with the use of borrowed capital, or through rendering personal

services, or had never paid its officers the value of services received (the corporation being close-held), would be required to pay an unreasonably high tax if it were computed under the regular method provided in Section 301, Revenue Act of 1918.

Congress therefore wisely devised a method of arriving at a profits tax liability in such cases, which would not result in extortion. It provided that all foreign corporations and all domestic corporations falling in classes such as mentioned above should pay an average tax arrived at by averaging the percentage of net income paid as profits taxes by other "representative" corporations engaged in the same business and comparable as to size and other measurements expressly stated in Section 328.

IV (a)

Even before the enactment of the Revenue Act of 1924 the petitioner had no unreviewable discretion under the special assessment provisions of the Revenue Act of 1918, as shown by:

(a) Reference to Section 327 of the 1918 Act.

Let us quote herein and analyze Sections 327 and 328 to see whether even before the enactment of the Revenue Act of 1924 the Commissioner was entrusted with "unreviewable discretion" in their administration.

> "Section 327. That in the following cases the tax *shall* be determined as provided in Section 328:" (Italics supplied.)

The above is a *command*, a *direction*, not a mere license.

> "(*a*) Where the Commissioner is unable to determine the invested capital as provided in Section 326;"

Merely because the word "Commissioner" is used does not warrant the assumption of kingly precepts. Naturally the Commissioner, charged with the duty of auditing all returns, would be mentioned. As the Board of Tax Appeals stated in its opinion (1 B. T. A., 159, *et seq.*, R., 20), "It is not discretionary with him whether he shall be unable so to determine. It specifically makes his inability so to determine the test." If this connotes "unreviewable discretion" in respect to Sections 327 and 328, the Commissioner can well argue conversely that this language gives him unreviewable discretion on all questions concerning the determination of invested capital under the provisions of Section 326.

> "(*b*) In the case of a foreign corporation:"

If the Commissioner's claim herein is correct, it would mean that *all* foreign corporations would be subject to a secret tax, levied by an administrative official, without a right of review by the courts or the Board of Tax Appeals. There is nothing in Section 327 (*b*) to indicate that Congress intended such a situation. Neither do we believe it intended a different rule to apply as to domestic corporations whose cases fall within the other paragraphs of Section 327.

"(*c*) Where a mixed aggregate of tangible property and intangible property has been paid in for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively."

In the determination of invested capital under Section 326, certain statutory limitations are placed upon the amount of intangible values allowed in invested capital. The value of property paid in for bonds is *not* allowed in invested capital. Suppose, for example, that in 1850 a mixed aggregate of tangible and intangible property was paid into a close held corporation for bonds, preferred stock and common stock. The bonds were not issued for any specific property, neither was the stock. Therefore neither the present officers of the corporation, the Commissioner or even a magician could determine the invested capital in accordance with the rules enacted by Congress in Section 326. Here again, if this paragraph gives "unreviewable discretion," the Commissioner may also well claim similar discretion in respect to all invested capital questions under Section 326.

"(*d*) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section, would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross dispro-

portion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in Section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under Section 233 of Title II) consists of gains, profits, commissions or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive."

Whether a "hardship" exists is easily determined. If A Company pays out 60 per cent of its net income as profits tax because it operates on borrowed capital, or some similar abnormal condition, while B Company only pays 20 per cent, it requires no involved proceeding or special training to discern a "hardship." So, also, if a corporation used borrowed capital of $500,000 and invested capital of $100,000, whereas competitors having the same size business, used borrowed capital $30,000 and invested capital $570,000, does it require some mysterious process to arrive at the conclusion that the company was operating under "abnormal" conditions?

IV (b)

Reference to other sections of said act using language similar to that used in Section 327.

Does the direction that he "find" and "declare of record" that a "hardship" or "abnormality" exists have any peculiar significance? The various revenue acts are full of similar directory language in sections of the law which have been reviewed time and again by the courts and by the Board of Tax Appeals.

Section 203, Revenue Act of 1918, provides:

> "That whenever *in the opinion of the Commissioner* the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner with the approval of the Secretary, may prescribe as *conforming* as nearly as may be to the best *accounting practice* in the trade or business, and as most clearly reflecting the income." (Italics ours.)

Whether inventories are necessary to reflect income and what is the best accounting practice is a subject which has been reviewed by the Board of Tax Appeals in the following and many other cases, *in which the Commissioner has acquiesced:*

Appeal of Buss Company, 2 B. T. A., 266;

Appeal of George C. Peterson Company, 1 B. T. A., 690;

Appeal of When Clothing Company, 1 B. T. A., 973;

Appeal of Champion Stove Company, 1 B. T. A., 656;

In Section 204(*b*) it is provided that:

> "(*b*) If for any taxable year * * * it appears upon the production of evidence *satisfactory to the Commissioner* that any taxpayer sustained a net loss, the amount of such net loss shall under regulations prescribed by the Commissioner with the approval of the Secretary be deducted from the net income of the taxpayer for the preceding taxable year * * *." (Italics ours).

A "net loss" is defined by statute in Section 204(*a*). This question has, in spite of said language, been the subject of litigation before the Board and the courts.

Appeal of J. J. Harrington, 1 B. T. A., 11;

Appeal of Butler Warehouses, Inc., 1 B. T. A., 1388.

and many others:

Auburn & Alton Coal Company *v.* U. S., decided, United States Court of Claims, January 18, 1926.

In Section 212(*b*), Revenue Act of 1918, it is provided that where a taxpayer's books do not clearly reflect his income—

> "The computation shall be made upon such basis and in such manner as in the opinion of

> the Commissioner does clearly reflect the income * * *."

The Commissioner has never claimed he had unreviewable "discretion" under Section 212(*b*). Appeals under this provision have been decided by the Board in the following cases:

Appeal of David Welch, 2 B. T. A., 64;
Appeal of Theresa Goodman, 1 B. T. A., 915;
Appeal of Henry Birn, 1 B. T. A., 416;
Appeal of Harry and Kate Cannon, 1 B. T. A., 720;
Appeal of Max and Jennie Kass, 1 B. T. A., 1115;
Appeal of Morris Feuer, 1 B. T. A., 1113;
Appeal of Union Market, Inc., 2 B. T. A., 429.

It has also been reviewed in court—

In re The U. S. Metal Goods Company, 4 Fed. (2d), 871.
In re Max Sheinman, Bankrupt, July 30, 1926, U. S. District Court, E. D. of Pa., 14 Fed. (2d), 323.

Under Section 214(*a*), (1), deductions are allowed in determining net income for

> "(1) All ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries * * *."

Under Section 214(*a*), (8), deductions are also allowed for—

> "(8) a reasonable allowance for the exhaustion, wear and tear of property * * *."

and under Section 214(*a*), (10), in the case of mines, oil and gas wells, etc.,

> "(10) a reasonable allowance for depletion * * *."

The determination of what is "ordinary and necessary" and what is "reasonable" involves the use of mature judgment, but the Commissioner's guess on these subjects is plainly reviewable.

Appeal of L. S. Dickey Grocery Co., 1 B. T. A., 108;
Appeal of The Farmers Grain Co., 1 B. T. A., 605;
Appeal of Arthur H. Ingle, 1 B. T. A., 595.

and many others.

Alworth Stephans Co. *v.* Lynch, 278 Fed., 959;
Camp Bird, Ltd. *v.* Howbert, 262 Fed., 114;
Cohen *v.* Lowe, 234 Fed., 474;
N. C., St. L. Ry. Co. *v.* U. S., 269 Fed., 351.

Under Section 214 (*a*), (12), (*b*), if it is shown "to the satisfaction of the Commissioner" that a substantial loss was sustained in 1919 in disposing of the inventory on hand at the end of 1918, such loss could be used to reduce 1918 income. It has never been claimed that the Commissioner's failure to find a substantial loss was not reviewable.

Under Section 222 certain credits are allowed for taxes paid to foreign countries upon income derived from sources therein and subdivision (*c*) provides—

> "(*c*) These credits shall be allowed only if the taxpayer furnished evidence *satisfactory to the Commissioner* showing the amount of such income derived from sources within such foreign country or such possession of the United States, and all other information necessary for the computation of such taxes." (Italics supplied.)

The intent of this section is merely to make it clear that the taxpayer claiming the deduction shall have the burden of obtaining all necessary proof from the foreign country, but if the Commissioner, through prejudice, refused to give due effect to the evidence could it be said that his refusal to grant the deduction could not be reviewed?

In Section 326 (*a*), (2), invested capital is defined to include—

> "(*a*) Actual cash value of tangible property other than cash bona fide paid in for stock or shares * * * but in *no case* to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in *is shown to the satisfaction of the Commissioner* to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid in surplus"; * * * (Italics ours.)

The following cases in which courts have undertaken to review the judgment of the Commissioner in valua-

tion cases show that the vagueness existing in value determinations has not induced the courts to regard the Commissioner's right as in any sense discretionary:

As to value of legacies and decedent's estates under Estate Tax:

Curley *v.* Tait, 276 Fed., 840;
Dugan *v.* Miles, 276 Fed., 401;
Herold *v.* Kahn, 159 Fed., 608.

As to basic value (December 31, 1908, or March 1, 1913):

Safe Deposit Co. *v.* Miles, 273 Fed., 822; Affd., 259 U. S., 247;
Towne *v.* McElligott, 274 Fed., 960;
Pitney *v.* Duffy, 291 Fed., 621;
Lynch *v.* Turrish, 247 U. S., 221;
Walter *v.* Duffy, 277 Fed., 41;
Great Northern Ry. Co. *v.* Lynch, 545 U. S. Tax Cases, 241;
Hays *v.* Gauley Mtn. Coal Co., 247 U. S., 189.

As to value of property included in invested capital:

Castner, Curren & Bullitt *v.* Lederer, 275 Fed., 221;
Allworth Stephens Co. *v.* Lynch, 278 Fed., 959.

As to value for purposes of depletion:

Allworth Stephens Co. *v.* Lynch, *supra.*

As to depreciation allowable:

Camp Bird, Ltd. *v.* Howbert, 262 Fed., 114;
Cohen *v.* Lowe, 234 Fed., 474;
N. C. & St. L. Ry. Co. *v.* U. S., 269 Fed., 351.

As to value of capital stock under capital stock tax:
Central Union Trust Co. *v.* Edwards, 282 Fed., 324.

It, therefore, appears that Congress, in enacting the Revenue Act of 1918, was *lavish* in using all through the Act such phrases as "to the satisfaction of the Commissioner," "whenever in the opinion of the Commissioner," "reasonable allowance," etc. If the force and effect is given to such language as claimed by the Commissioner of Internal Revenue he would have more power than any cabinet officer, the President of the United States, or the whole Judiciary. That would be highly pleasing and complimentary to an official in charge of only one of the many Bureaus of the Treasury Department. But it is not quite so complimentary when we read all these quotations from the 1918 Act in connection with the legislative history cited herein regarding investigations of his administration and the determination by Congress that it was necessary to establish an executive body to review all his determinations before he would be allowed to assess a deficiency in tax.

IV (c)

Reference to Section 328 of said act.

Having analyzed Section 327, let us also consider Section 328, Revenue Act of 1918, which reads as follows:

> "SEC. 328 (*a*) In the cases specified in section 327 the tax *shall be* the amount which bears the same ratio to the net income of the taxpayer

(in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax *shall be computed* without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

"In computing the tax under this section *the Commissioner shall compare* the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

"(*b*) For the purposes of subdivision (*a*) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

* * * * * * *

"(*c*) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (*a*), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Com-

missioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257." (Italics ours.)

No unreviewable discretion is indicated by the language of this Section. In fact, Congress was very specific in its directions as to the kind of corporations with which a comparison should be made and as to how the tax should be computed. Ordinary *judgment* is all that was called for on the part of the Commissioner. When Congress so specifically directs how the comparison shall be made, and how the average tax shall be arrived at, it would appear that not nearly as much "discretion" or opportunity to exercise judgment, was given the Commissioner as was given in other sections of the law, such as in the determination of a "reasonable allowance for compensation of officers" and other similar provisions of the act, referred to in pages 19-22 herein.

The true and full significance of the petitioner's appeal in this case is that he has resented both the investigation of his Bureau by Congress and the creation of the Board of Tax Appeals to review his determinations. He has attempted to write into the Revenue Act of 1924 an *implied* exception based on language used in a former act enacted at a time when Congress was satisfied with the administration of the Bureau of Internal Revenue.

The petitioner evidently doubts the wisdom of Congress when it created the Board of Tax Appeals. A

great majority of the taxpayers probably do not agree with his views. But the question herein does not depend upon whether the petitioner's administration should have been criticised, or whether Congress acted wisely in creating the Board. It is whether an *implied* exception may be written into the very plain language of the 1924 Act.

V.

The Board has jurisdiction to review the petitioner's determination for both the years 1918 and 1919, as Section 274 (g) of the Revenue Act of 1926 does not affect appeals filed with the Board prior to the enactment of said act.

The petitioner has also asserted that the Board has jurisdiction in this case only over the year of 1919 because he had determined an additional assessment for that year of $10,240.09 and an overassessment of $9,296.17 for 1918, or a net deficiency of $943.92.

The Commissioner made his final determination in respect to *both* years in his deficiency letter. Section 281, Revenue Act of 1924, provided that where there had been an overpayment for one year the amount thereof "shall be credited against any tax or installment thereof then due from the taxpayer * * *." The Commissioner was by law forced to handle both years together and, at least, having so handled them, the Board could not arrive at the correct amount of any deficiency for 1919 without at the same time considering 1918. The Board carefully considered this question of jurisdiction in the Appeal of E. J. Barry,

1 B. T. A. 156. It held it had jurisdiction and the Commissioner published notice of acquiescence in said decision (Int. Rev. Cum. Bull., C. B. IV-2-1).

When Congress enacted the Revenue Act of *1926* it changed this rule as to appeals filed thereafter. Section 247 (*g*) provides as follows:

> "Sec. 247 (*g*). The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."

Even if this was to be given a retroactive effect, applicable to appeals filed prior to the enactment of the 1926 Act, it would still be necessary for the Board to retain jurisdiction of 1918, because in auditing the 1919 return invested capital has been reduced by the amount of the 1918 tax as determined by the Commissioner, whereas if said 1918 tax liability is excessive, as alleged by the respondent, invested capital for 1919 has been reduced too much. Section 274(*g*) above would at least give the Board jurisdiction of 1918 for that purpose.

It is the accepted rule of statutory construction that any law shall not be deemed to have retroactive effect unless clearly provided for.

25 R. C. L., p. 787;

U. S. *v.* St. Louis, San Francisco & Texas Ry. Co., 270 U. S., 1;

Schwab *v.* Doyle, 258 U. S., 529;
Eidman *v.* Martinez, 184 U. S., 578;
White *v.* U. S., 191 U. S., 545;
Story, Const. Sec. 1398.

Furthermore, this objection should be raised, if at all, in the proceeding on the merits of the case now pending before the Board.

The petitioner expresses concern lest courts and juries review his determinations under Sections 327 and 328. It would be much easier for a court or a jury to determine the issues arising in such cases than under almost any other section of the revenue acts. Whether one business is "like" or "representative" of another is a simple issue. Whether a "hardship" exists is a matter of simple comparison. The arrival at an average percentage of net income paid as profits tax is merely a simple problem in addition and division. As a matter of law, not many issues of fact under these sections would even be submitted to a jury.

It is clear that no jury will ever pass upon the present or any other case appealed to the Board of Tax Appeals. Those taxpayers who have elected so to do have only a right to appeal to a circuit court of appeals. Why does the appellant fear review by a court? Does he think the judges of the courts are less intelligent than the clerks employed by the Commissioner of Internal Revenue? His concern is not understandable.

VI.

The recent decisions of the United States Court of Claims in the case of Williamsport Wire Rope Company v. The United States, and of the United States District Court for the Northern District of Ohio in the case of The Feilbach Company v. Niles, Collector, are not in point in a case involving the jurisdiction of the United States Board of Tax Appeals.

The petitioner quotes as Appendix A in his brief the decision of the Court of Claims of the United States, in the case of the Williamsport Wire Rope Company *v.* The United States (decided May 2, 1927). The facts in that case are partly similar to your respondent's 1919 case, where the Commissioner has refused to act under Section 328. Your respondent's 1918 case is *not* similar to the above case, because the Commissioner *has* acted under Section 328, and the court indicates that if the Commissioner *had* so acted, the way would then have been paved for the review of his decision.

Our case is also distinguishable as to both years in that we have involved none of the problems regarding the statutory consent of the Government to be sued.

The Court of Claims finds difficulty in many cases with this problem of consent to be sued. It recently found similar difficulty in the case of the Toxaway Mills Company *v.* The United States, 61 Court of Claims 363, in respect to which the Government later confessed error in this Court on certiorari. The peculiarities of the practice before the Court of Claims

have nothing to do with an appeal before the Board of Tax Appeals, a part of the Executive Branch of the Government.

With all due respect to said court, we assert its decision should be reversed in the proceedings before this Court on certiorari (No. 337). It takes the position that since the Commissioner computed the taxes under Section 301, instead of Section 328, no contest may be had before that court except as to the computation under Section 301; that if the Commissioner *had* determined the tax under Section 328, the court could then review his action.

As illustrating the unsound reasoning of said court, if a corporation had had its tax liability computed under the individual income and surtax rates provided by Sections 210 and 211, Revenue Act of 1918, and had sued in the Court of Claims, pointing out that it should be assessed either under Section 301, 302 or 328, the court would take the position that it could not review the Commissioner's action unless he had acted under said Sections 301, 302 or 328.

The Commissioner, the Board of Tax Appeals or a court cannot arrive at a taxpayer's true tax liability unless they apply all applicable sections of the law. If a case properly falls under any section of the law and the Commissioner refuses to apply that section, his error should be reviewed.

The petitioner has also printed as Appendix B, in his brief, the decision of Judge Killets, in the case of The Feilbach Company *v.* Niles, Collector, a case arising under Section 210 of the Revenue Act of 1917.

While the statutes involved are different, and we are not informed as to the allegations of the petition, we wish to refer back to pages 25 to 31 herein where similar language has been used in the various Revenue Acts and cases thereunder have been the subject of a large amount of litigation with no suggestion of "unreviewable discretion." We frankly disagree with the reasoning of the decision and commend to this Court, by way of comparison, the excellent and carefully considered opinions of the Board of Tax Appeals (1 B. T. A., 159, R., 17) and the Court of Appeals, District of Columbia (17 Fed. (2d), 663, R., 44), in the case herein.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Section 210, Revenue Act of 1917.

"Sec. 210. That if the Secretary of the Treasury is unable in any case satisfactory to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000."

"For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used."

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1927.

David H. Blair, Commissioner of Internal Revenue, Petitioner, *vs.* Oesterlein Machine Company.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[November 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

This is a proceeding brought in the Supreme Court of the District of Columbia under § 1025 (a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 348; U. S. C., Title 26, § 1258) to compel the Commissioner of Internal Revenue to respond to a subpoena of the Board of Tax Appeals issued under § 900 (i) requiring him to answer interrogatories, and to furnish information contained in the tax returns of twelve corporations. The Commissioner denied the authority of the Board to require a response to the subpoena. A decree upholding the jurisdiction of the Board and ordering the Commissioner to obey was affirmed by the Court of Appeals of the District [17 Fed. (2d) 663]. The case is here on certiorari. — U. S. —.

Respondent corporation returned and paid excess profits taxes for the years 1918, 1919 and 1920. In the final determination of these taxes the Commissioner considered together the returns for all three years. He reduced the 1918 tax, increased the 1919 tax, and found the net balance as a deficiency. In fixing the amount of the tax for 1918 the Commissioner, as requested by the taxpayer in an amended return for that year, made a special assessment under §§ 327 and 328 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1093) but decided that no grounds existed for a special assessment for the year 1919, and so determined the tax for that year using the ordinary assessment method provided by §§ 301, 311 and 312.

The invested capital of the corporation taxed is one of the necessary factors in the computation of the tax under those sections.

In evident anticipation that in some cases the Commissioner might find it difficult or impossible to ascertain the invested capital or that in the disturbed economic conditions left by the war the tax in some cases might be harsh in comparison with others, a special method of assessment for those cases (enumerated in § 327) was provided by § 328. These sections, printed in the margin,[1] authorize the computation of the excess profits tax on the basis of a comparison with the data contained in the tax returns of other corporate taxpayers similarly situated.

Respondent, on appeal to the Board of Tax Appeals, assailed the determination of the Commissioner on the ground that although the 1918 tax had been assessed under § 328 the standard of comparison applied was erroneous and resulted in an excessive assessment, and on the ground that the tax for 1919 should have been assessed under § 328. As to the latter contention it set up that as the Commissioner had been unable satisfactorily to determine respondent's invested capital for 1917 and 1918, he could not have

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[1]Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

Sec. 328 (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of

done so for 1919, and that, since the net income for 1919 was abnormal, its profits tax, if assessed by the ordinary method, would be found excessive compared with the tax assessed on other representative corporations.

The subpoena called for information concededly relevant to these contentions and was properly issued if the Board of Tax Appeals had authority to make the inquiry. The Commissioner denies generally that any determinations made by him under §§ 327 and 328 may be appealed, and in any case objects that the appeal as to the year 1918 was not properly taken.

The appeal was authorized if at all by § 900 (e) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 337; U. S. C., Title 26, § 1216) under § 274 of that Act. Section 274 permits an appeal by the taxpayer only if "the Commissioner determines that there is a deficiency in respect of the tax" which has been returned. "Deficiency" is defined by § 273 as "(1) The amount by which the tax imposed . . . exceeds the amount shown as the tax by the taxpayer upon his return; . . . (2) If no amount is

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the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

. . . . .

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

shown as the tax by the taxpayer on his return, . . . then the amount by which the tax exceeds the amounts previously assessed . . . as a deficiency. . . ."

It is argued that although there was a deficiency for 1918 and 1919, as considered together by the Commissioner, the years must be treated separately in determining whether a deficiency existed within the meaning of § 274, for purposes of appeal. So treated there was no deficiency in the year 1918, since the Commissioner had reduced the amount of the tax returned and paid for that year. This argument was rejected in Appeal of E. J. Barry, 1 B. T. A. 156, and the Commissioner appears formally to have announced his acquiescence in its rejection. Int. Rev. Cum. Bull. IV-2-1.

We think the question suggested is not properly before us. It was not specifically raised on the record before the Board or either court below and, so far as appears, was not considered by any of them. We were asked to grant certiorari only to pass upon the question whether the Commissioner's determinations under §§ 327 and 328 may be appealed to the Board of Tax Appeals. This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U. S. 95. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government. Hence we do not pass upon this aspect of the case with respect either to the return or the amended return for 1918, and our decision is without prejudice to the disposition of the question wherever appropriately presented.

The Commissioner's objection that as to both years the Board of Tax Appeals is without authority to review his action is based not on any limitations to be found in the sections of the act defining the jurisdiction of the Board, but upon the peculiar provisions of §§ 327 and 328 themselves. These, it is argued, vest in the Commissioner the exercise of a judgment and discretion in their nature not subject to appellate review. It is pointed out that by § 327 assessments in the manner provided in § 328 are permitted "where the Commissioner is unable to determine" the invested capital of the taxpayer, or where "the Commissioner is unable satisfactorily to determine" the value of a mixed aggregate of tangible and intangible property paid in as capital, or where the Commissioner

"finds and so declares of record that the tax if determined without benefit of this section" would, owing to abnormal conditions work a hardship on the taxpayer. And it is urged that this phraseology, evidences an intention to make his decision final. The conclusion is said to be fortified by the confidential nature of the returns of taxpayers with which comparison must be made in order to make the assessment under § 328. Their privileged character is thought to preclude a construction of the appeal statute that would result in giving publicity to tax returns and confidential information so carefully guarded by other provisions of the revenue acts.

But there is no inherent impossibility or, indeed, serious difficulty in reviewing judicially any determination authorized by §§ 327 and 328. The determination is to be made upon prescribed and ascertainable data and is to conform to standards set up by the statute, all defined with sufficient definiteness and clarity to be susceptible of judicial scrutiny. We cannot assume that it is to be either arbitrary or unrelated to the appropriate data in the Commissioner's office, or that he is more qualified to make it than the Board established to review his decisions. An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character. Not only is it required by § 900 (e) to hear and determine appeals taken under § 274, which in terms allows an appeal in every case where a deficiency is found by the Commissioner, but it is empowered to administer oaths and to compel the attendance of witnesses and the production of documents and records. It may investigate anew the issues between the government and the taxpayer and upon the determination of the appeal it may affirm, set aside or modify the findings and decision of the Commissioner. In the light of such provisions there is plainly no sufficient ground for reading into § 274, allowing an appeal wherever a deficiency is found by the Commissioner, an exception based on the supposedly sacrosanct character of his determinations under §§ 327 and 328.

But little weight can be given to the suggestion that the Board's appellate powers are limited by the section of the Act prohibiting the publication by collectors of information gained in the course of their duties. § 1018, reënacting § 3167 of the Revised Statutes (U. S. C., Title 18, § 216). The prohibition is limited to

disclosures made "in any other manner than may be provided by law." It cannot be deemed to forbid disclosures made in obedience to process lawfully issued in a judicial or quasi-judicial proceeding, as has, indeed, been recognized by the Treasury Department itself in Treasury Decision No. 2962, directing that copies of returns may be furnished for the government's use as evidence in court. Neither the statute nor the practice of the Department suggests the existence of any governmental policy with respect to the use of the returns as evidence in any way inconsistent with the provisions of the statute authorizing the Board of Tax Appeals to hear appeals and conduct proceedings which are judicial in character.

As we do not pass upon the question whether the Board of Tax Appeals had jurisdiction of the appeal, except insofar as it is involved in our decision that the determinations of the Commissioner under §§ 327 and 328 are subject to review by the Board, the decree will be so modified as to be without prejudice to the petitioner's presenting in any appropriate manner to the Board or the Supreme Court of the District the questions whether the Board of Tax Appeals had in other respects jurisdiction of the appeal as to the tax for 1918 and, if not, to what extent the information called for by the subpoena is relevant and admissible upon the hearing of the appeal as to the tax for 1919.

Affirmed as modified.

A true copy.

Test:

Clerk, Supreme Court, U. S.